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"The Long Arm of the Law" --European Merger Regulation and Its Application to the Merger of Boeing and(&) McDonnell Douglas

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The successful competitor, having been urged to compete, must not be turned upon when he wins.[1]

I. INTRODUCTION

During the 18th century, Adam Smith developed the original concept of competition.[2] In *The Wealth of Nations* (1776), Smith merely intended that competition be the absence of legal restraints on trade.[3] Smith used the phrase "perfect liberty" which today is interpreted to mean "perfect competition."[4] Modern economic theory developed in the late 19th century in the United States and is based on this model of perfect competition.[5] It is an understatement to say a perfect competition system is difficult to achieve,[6] because, as Smith observed, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public, or in some contrivance to raise prices."[7]

Early economists believed that the real world did not correspond to this model of perfect competition.[8] Instead, these economists developed the "traditional" view of competition.[9] The traditional view sought to bring the "real" market closer to the "ideal" market of perfect competition. Through regulation, Traditionalists sought to curtail the collusion that Smith observed and to do away with practices which stood in the way of perfect competition and restricted the freedom of buyers and

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1. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 430 (2d Cir. 1945).

2. *See* JOSEPHINE STEINER, TEXTBOOK ON EC LAW 134 (4th ed. 1994) (explaining the notion of competition as originating with Adam Smith's belief that competition is beneficial for both consumers and manufacturers, and that governmental intervention only impedes these benefits); *see also* THOMAS KARIER, BEYOND COMPETITION—THE ECONOMICS OF MERGERS AND MONOPOLY POWER 10 (1993) (discussing the fact that Smith's *Wealth of Nations* was dedicated to government supported monopolies). Smith's concern was over negative attributes of corporations granted the exclusive right to trade with a specific commodity or in a specific region. *Id.* Smith described such companies as "destructive to those which have fallen under their government." *Id.*

3. *See* STEINER, *supra* note 2, at 134 (relating that Smith's invective was reserved for corporate domination created by merchantilist governments).

4. *See* ALMARIN PHILIPS, MARKET STRUCTURE, ORGANIZATION AND PERFORMANCE 12 (1962) (explaining Smith's idea of a "natural price," which is a price that covers the costs of production and a reasonable profit, and exists when there is perfect liberty or today's theory of "free entry"). Smith saw the market close to perfect competition if free entry and free international trade existed. *Id.*

5. *See* STEINER, *supra* note 2, at 134 (pointing to the United States' first anti-trust legislation, the Sherman Act of 1890). The perfect competition model is quite idealistic and assumes: (1) that there are a large number of buyers; (2) that consumers have perfect information, and always act to maximize utility; (3) that sources flow freely from one area to another; (4) that there are no barriers to entry; and (5) that business people always maximize profits. *Id.*

6. *See id.* (making the observation that many variables must be acting to their maximum potential in order to have perfect competition). An economy with perfect competition guarantees maximum efficiency and the optimum allocation of resources. *Id.* In reality, it is the direct opposite of a monopoly. *Id.*

7. KARIER, *supra* note 2, at 10.

8. *See* STEINER, *supra* note 2, at 134 (stating that traditionalists believed there were corporate practices which stood in the way of achieving perfect competition).

9. *See id.* (declaring governmental intervention was needed to preserve opportunities for competitive activity). This intervention was seen as necessary to give consumers a real choice. *Id.*

sellers.[10] The result of the traditional view was the 1890 Sherman Act[11] in the United States,[12] and post Second World War anti-trust laws in Western Europe.[13]

Opposition to the traditional view, although implicit in the *laissez-faire*[14] view of the early 19th century, is particularly strong in the United States and is gaining ground in the European Community (EC).[15] The opposition believes the real world approximates quite well to the model of perfect competition.[16] As long as there are no barriers to entry, then even monopolies are not anti-competitive.[17] Therefore, the modern view is that only minimal governmental intervention is necessary, and then only to curb the most egregious violations of the competitive arena.[18] The late United States Commerce Secretary Malcolm Baldridge[19] embraced the modern view when he stated, "We are simply living in a different world today[.] Because of larger markets, [and] the cost of research and development, new product innovation, marketing, and so forth . . . it takes larger companies to compete successfully."[20]

Sharing the same spirit, the EC, in the European Economic Community Treaty (EC Treaty), emphasizes competition because the EC believes competition is an essential aspect of the market mechanism.[21] In the introduction to its *First Report on Competition Policy,*[22] the European Commission (Commission) wrote, "Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all."[23] The Commission further stated, "[c]ompetition enables enterprises continuously to improve their efficiency, which is the *sine qua*

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10. *See id.* (explaining the "traditional" view and stating that regulation was also necessary to allow small and medium sized businesses to survive making the market more competitive and preserving a real choice for consumers).

11. Sherman Antitrust Act, 15 U.S.C.S. §1 (1890).

12. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY-AN ECONOMIC AND LEGAL ANALYSIS 19 (1965) (commenting on the Sherman Act stating Congress was seeking to protect competition and prevent monopoly). In essence, Congress was trying to make capitalism more efficient. *Id.*

13. STEINER, *supra* note 2, at 134.

14. BLACK'S LAW DICTIONARY 876 (6th ed. 1990) (defining "laissez-faire" as the doctrine favoring governmental abstention from interference in economic or commercial affairs).

15. STEINER, *supra* note 2, at 134.

16. *Id.* at 135.

17. *See id.* (explaining that monopolies are not anticompetitive if other businesses are not prevented from entering the field as competitors).

18. *Id.*

19. *See* Cecelia M. Waldeck, Comment, *Proposals for Limiting Foreign Investment Risk Under the Exxon-Florio Amendment,* 42 HASTINGS L.J. 1175 n.32 (1991) (stating that Malcolm Baldridge was the Secretary of Commerce during the Reagan Administration).

20. Walter Adams & James W. Brock, *The Bigness Mystique and the Merger Policy Debate: An International Perspective,* 9 J. INT'L L. BUS. 1 (1988).

21. *See* DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 377 (1993) (pointing out that competition was a key factor in the pursuit of the broad objectives laid down for the Community in Article 2). The list of "activities of the Community" in Article 3 of the EC includes "the institution of a system ensuring that competition in the common market is not distorted"). *Id.*

22. *First Report on Competition Policy,* Introduction, 2 EEC Competition L. Rep. (MB) 1407 (1971) [hereinafter *First Report*].

23. WYATT & DASHWOOD, *supra* note 21, at 377.

non for a steady improvement in living standards and employment prospects within the countries of the Community."[24]

Whether a corporation is competing in the U.S. or the EC, a corporation must achieve economies of scale in order to be competitive.[25] To achieve economies of scale, a corporation must substantially increase its size.[26] A giant firm enjoys economies of scale since it reduces costs by using the most advanced techniques of production; it maximizes the benefits of the division of labor; it distributes fixed costs over a mass production volume of output; it combines the factors of production in the most efficient manner; and, it protects itself against fluctuations in production and price.[27] For many corporations, regardless of their origin, economies of scale may be achieved in only one manner, the corporate merger.[28]

This Comment discusses European Community regulation of corporate mergers in today's competitive global economy by analyzing the recent European Commission decision to conditionally approve the merger of two corporations external to the EC, Boeing and McDonnell Douglas.[29] Discussion within this Comment explores the development of the European Merger Regulation and the power the European Commission possesses in its application.[30] Further, analysis shall be made of the application of the Merger Regulation to the recent merger of the number one and number three aircraft manufacturers in the world: Boeing and McDonnell Douglas.[31] That analysis explores whether the European Commission is infusing controversial national interests with its decisions in an attempt at protectionism.[32]

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24. *See id.* (claiming European competition policy is understood to ensure that Common Market envisaged by the framers of the EC Treaty functions as a genuine market).

25. *See* PETER ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION 34-35 (1980) (explaining "economies of scale" to be a decline in the per-unit cost of a product resulting from increased output, usually due to increased production facilities). It is a savings resulting from the efficiency of large-scale processes. *Id.*

26. *See* Adams & Brock, *supra* note 20, at 1 (discussing the belief of some top United States business executives that U.S. companies must become larger in order to withstand pressure from foreign competitors).

27. *See id.* (relating U.S. executives concern over foreign competitors). Executives say if U.S. corporations are to survive, there have to be more consolidations to achieve needed economies of scale. *Id.* They conclude that corporate consolidation is the only thing that will save a maximum number of jobs in the U.S. *Id.*

28. *See generally id.* (noting that on June 29, 1966, the president of the EC Commission informed the European Parliament that "competition within the Common Market and competition from outside the market, as well as the need to promote technological progress, make an increase in firm size not only desirable, but indispensable for survival"). Therefore, he said, "the Commission will actively encourage the principle means of achieving that goal by supporting the necessary mergers, concentration, inter corporate stock ownership, joint ventures, etc." *Id.*

29. *See infra* notes 41-309 and accompanying text (discussing the policy behind EC merger regulation and its application to the Boeing and McDonnell Douglas merger).

30. *See infra* notes 41-246 and accompanying text (explaining the Merger Regulation's criteria for application and the Commission's discretion in using the Merger Regulation).

31. *See infra* notes 247-309 and accompanying text (analyzing the Boeing and McDonnell Douglas merger in light of the EC's Merger Regulation).

32. *See infra* notes 118-309 and accompanying text (relating the broad power of the Commission to apply the Merger Regulation to gain desired results).

Such results make a strong case for a neutral supranational authority to decide mergers with a global impact in the future.[33]

Part II examines the goals of competition law and the EC merger regulation, as well as the need for merger regulation.[34] Part III assesses the history of European merger regulation by reviewing Articles 85 and 86 of the EC Treaty and regulation 4064/89 (The Merger Regulation).[35] Part IV explores the power and function of the Commission with regard to its ability to regulate mergers.[36] Part V reviews the application of the Merger Regulation to a corporate merger.[37] Part VI analyzes the recent Commission decision in the Boeing and McDonnell Douglas merger to determine whether the decision is consistent with the objectives and goals of the EC.[38] Part VII briefly relates the possibility of a neutral merger agency through the World Trade Organization.[39] Finally, Part VIII concludes the EC, although apparently consistent with stated competition criteria and objectives, allows politics and other European specific concerns to enter their decisions to the detriment to foreign firms and the world economy.[40] The Comment suggests a neutral authority may be a necessary solution.

II. THE GOALS OF EC MERGER REGULATION

Article 2 of the EC Treaty states the goals of the European Community:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in

33. *See infra* notes 310-38 and accompanying text (explaining the possibilities of creating a supranatural authority to decide the merits of proposed international mergers).

34. *See infra* notes 41-59 and accompanying text (discussing the policy behind merger regulation in the EC and the need for regulation of mergers in order to protect competition).

35. *See infra* notes 60-117 and accompanying text (laying out the development of EC regulation of mergers and discussing the most recent, the Merger Regulation).

36. *See infra* notes 118-69 and accompanying text (describing the Commission's function and powers generally and in relation to the regulation of mergers).

37. *See infra* notes 170-246 and accompanying text (exploring the Merger Regulation and its various rules and criteria for application).

38. *See infra* notes 247-309 and accompanying text (discussing the Boeing and McDonnell Douglas merger in general and the Commission's decision to approve the merger, but only after it had sufficiently protected its own interest, Airbus Industries).

39. *See infra* notes 310-38 and accompanying text (stating the need for and the possibilities of forming a supranatural authority to over-see transnational mergers).

40. *See infra* notes 339-41 and accompanying text (concluding that if competition is the goal of the EC, then there is no place for protectionism which works to the detriment of the global economy).

stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[41]

The framers of the EC Treaty singled out competition policy as a key factor to achieve the broad objectives laid down for the Community in Article 2.[42] This is evident in Article 3 which points to "the institution of a system ensuring the competition in the common market is not distorted."[43] There are two main reasons why competition policy was singled out as important to the goals of the European Community. First, a conscious choice was made by the framers of the Treaty about a way of life in which the market plays a central, though not exclusive, role.[44] Second, competition policy contributes to the creation and preservation of a market that is common, since it aims to remove barriers between Member States.[45]

In the *First Report on Competition Policy*,[46] the Commission identified three objectives: (1) the prevention of barriers to trade being erected by private agreements between businesses, abuses of monopoly power, or state subsidies in an effort to keep the market open and unified; (2) the maintenance of fair[47] and effective competition as the spur to the creation of a single market; and (3) the encouragement of efficiency, innovation, and lower prices in an effort to protect the legitimate interests of workers, users and consumers.[48]

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41. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), art. 2 [hereinafter EC TREATY].

42. *See* WYATT & DASHWOOD, *supra* note 21, at 377 (claiming a conscious choice was made by the framers of the EC Treaty and those who have signed onto it, not only of economic unity, but also of a way of life in which the international market plays an important role).

43. EC TREATY, *supra* note 41, art. 3.

44. *See* WYATT & DASHWOOD, *supra* note 21, at 377 (explaining competition is an important part of the market mechanism because the availability of choice between goods and services establishes a link between a company's success and its ability to serve consumers adequately). "Effective" competition must be preserved. *Id.* That is, there must be a certain level of challenge from other operators sufficient to force corporations to embrace efficiency and innovation as a condition of survival in the market. *Id.*

45. *See id.* at 377-78 (stating if a corporation could isolate their markets through restrictive practices or a Member State could isolate their market using special aid policies giving competitive advantages to national industries, the EC's efforts to create a single market without internal barriers in goods, persons, services and capital would be futile). The rules on competition are designed to open up possibilities for Community-wide competition in order to supplement or assist the achievement of greater prosperity through the use of economies of scale. *Id.*

46. *First Report*, *supra* note 22.

47. Sarah Turnbull, *Barriers to Entry, Article 86 EC and the Abuse of a Dominant Position: An Economic Critique of European Community Competition Law*, 2 EUR. COMPETITION L. REV. 96, 102 (1996) (discussing the reason for the fairness objective is to give special consideration to small and medium companies that lack market strength). *But see*, *First Report*, *supra* note 22, at 1409 (stating in the report that the Commission recognizes Government subsidies which consider the EC's interests and are considered 'necessary' do not conflict with the principle of fair competition).

48. *See First Report*, *supra* note 22, at 1408-09 (relating agreements with the purpose of fragmenting the EC market into regions are a flagrant contradiction to the provisions of the EC Treaty). Additionally, the Commission is concerned about increasing the amount of goods available to consumers, informing consumers to promote better decision making in an effort to provide the best atmosphere for establishing a common market. *Id.*

There are several types of arrangements which are considered a serious threat to the achievement of the Commission's objectives.[49] Market-sharing and quotas are such arrangements. The direct result of these agreements is the elimination of the "exchange of goods between the Member States concerned."[50] Another such arrangement is price-fixing. "These agreements to fix prices and to protect national markets are mutually complimentary and constitute, therefore, an obstacle to trade since they prevent buyers from benefiting from the competitive market conditions which would have prevailed had there been no such agreements."[51] A third suspect arrangement is joint selling agreements. "The exclusivity[52] enjoyed by the joint selling agency, the apportioning of delivery quotas and the fixing of prices prevent any competition among the members of the group who have, therefore, neither the incentive nor the capability to develop individual selling activities for their products at prices freely determined according to quantity and destination."[53] Finally, a fourth suspect arrangement is collective exclusive reciprocal dealing. These exclusive dealing agreements mean "that the market as a whole is never open to producers of the other Member States, and that buyers of the Member States itself can never choose from among all the goods available within the Common Market."[54]

While there are intercorporate arrangements the Commission finds unfavorable for the achievement of its competition objectives, Commission policy encourages cooperation between enterprises "where this can produce favourable [sic] economic results and maintain effective competition within the Common Market."[55] The Commission's permitted forms of cooperation include: specialization agreements,[56]

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49. *See generally First Report, supra* note 22, at 1419-36 (listing and explaining in detail each of the horizontal agreements which violate EC competition policy).

50. *See id.* at 1420 (explaining these agreements are generally entered into out of mutual respect for each Member State involved). However, the protection of the home market allows producers to adopt a commercial policy which is insulated from the competition of other parties. *Id.*

51. *Id.* at 1423-24.

52. *See id.* at 1427 (explaining the exclusivity is a result of the producers allocating among themselves the total quantity of products to be sold and offered at uniform prices and conditions of sale).

53. *See id.* (explaining the joint selling agreement is where producers grant an agent the right to sell their products in specified markets). Then the producers allocate among themselves portions of the total quantity of goods to be sold and offer these goods to the agents at set prices and conditions of sale. *Id.* The result of such joint selling agreements is buyers are deprived of a choice and there is no way for consumers to stimulate price. *Id.*

54. *See id.* at 1432 (explaining these exclusive purchase and delivery agreements are likely to impact competition because such agreements split a unified market into two parts). One part consists of manufacturers abiding by the agreement and those producers who do not adhere to the agreement. *Id.*

55. *Id.* at 1437.

56. *See id.* at 1439 (defining a specialization agreement as the agreed production between parties along with an obligation on each party to supply the other exclusively with the products he specializes in selling). These agreements promote technical cooperation which in turn creates a motive for standardization and rationalization, thus enabling these enterprises to offer better products at better prices. *Id.*

joint research and development agreements,[57] joint advertising and labeling, standardization,[58] and joint purchasing agreements.[59]

III. THE HISTORY OF MERGER REGULATION IN THE EC

On May 9, 1950, Robert Schuman, the French Foreign Minister, launched an idea which other influential Europeans quickly welcomed.[60] The idea intended to permanently end the risk of war between France and Germany over coal and steel resources.[61] Schuman proposed steel and coal resources be placed under the jurisdiction of a High Authority.[62] He believed this High Authority would provide the basis for economic union, thereby establishing the first concrete instruments of a European federation indispensable for the safeguard of peace.[63] From these efforts came the European Coal and Steel Community (ECSC) Treaty, signed in 1951.[64] In 1956 the Spaak Report was published.[65] This report contained proposals to expand

57. *See id.* at 1443 (relating the Commission has tried to remove obstacles to agreements on research and development because it believes research determines the competitiveness of companies, the advancement of the economy and the pace of technical innovation). The Commission is aware of the possibility of danger to competition, and therefore will examine each situation individually. *Id.*

58. *See id.* at 1447-48 (relating that advertisement agreements only become suspect when there is an oligopolistic market where advertising as a means of competition plays a critical role). Problems with labels arise when the use of a label is linked to obligations concerning production and marketing, such as when companies are not free to fix prices or are forced to sell or manufacture products as a result of such labeling agreement. *Id.* Standardization agreements are troublesome because such agreements lock a manufacturer into those products which are the object of the agreement. *Id.* at 1450. This type of agreement is subject to the general ban on cartels. *Id.*

59. *See id.* at 1451 (explaining joint purchase groups are advantageous since their size allows access to foreign supplies). The Commission, however, is concerned with the negative impact these groups can have on suppliers. *Id.* The market position of the participating companies and their aggregate power in relation to the supplier is the main problem to evaluate if effective competition in the EC is to be preserved. *Id.*

60. *See* PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW: FROM COMMON MARKET TO EUROPEAN UNION 2 (1992); *see also* WYATT & DASHWOOD, *supra* note 21, at 3 (stating that the motivation behind Schuman's proposal was fear of Soviet expansion after the Second World War and the conflict between France and Germany over the steel and coal industries).

61. *See* WYATT & DASHWOOD, *supra* note 21, at 3 (relating the goal of the pooling of steel and coal production making conflict between France and Germany impossible, and also providing a firm basis for economic expansion among the countries involved).

62. *See* WYATT & DASHWOOD, *supra* note 21, at 8 (discussing the role of the High Authority was to be central to the implementation of the European Coal and Steel Community Treaty). The High Authority was authorized, inter alia, to make legally binding decisions, fix prices for products and to fine corporations for violations of the ECSC's competition rules. *Id.*; *see also* MENGOZZI, *supra* note 60, at 2 (explaining that the High Authority would be an organization open to the participation of the other European countries); *see also* WYATT & DASHWOOD, *supra* note 21, at 3 (stating this scheme had far reaching implications). Schuman believed this union would be the first step in unionizing Europe which he believed was indispensable for peace. *Id.*

63. MENGOZZI, *supra* note 60, at 2; *see also* WYATT & DASHWOOD, *supra* note 21, at 4 (relating the strategy behind the treaty was to set precise economic objectives as steps towards the political objective of European unity).

64. MENGOZZI, *supra* note 60, at 2; *see also* WYATT & DASHWOOD, *supra* note 21, at 3 (revealing the ECSC Treaty was limited to fifty years, meaning the treaty is due to expire in 2002).

65. WYATT & DASHWOOD, *supra* note 21, at 7.

the ECSC's jurisdiction and to create this High Authority.[66] Finally, the petroleum crisis resulting from the nationalization of the Suez Canal led to the treaty creating the European Economic Community on January 1, 1958.[67] Over time, the membership of the European Community grew from the original six[68] under the ECSC, to twelve in 1986.[69]

The EC Treaty established three main political institutions: the Council, the European Parliament and the Commission.[70] This Comment examines the function of the Commission since it is the major creator and enforcer of European Competition policy.[71]

Today, the EC Treaty is essentially a "frame work" treaty, articulating broad general principles, but leaving its institutions to fill in the gaps with secondary legislation.[72] Article 2 sets out the general aims of the Treaty:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[73]

Article 3 spells out the specific activities of the European Community, including, *inter alia*, the elimination of customs duties between Member States, the elimination of restrictions on imports and exports and the institution of a system ensuring that competition in the EC is not distorted.[74]

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66. *See* MENGOZZI, *supra* note 60, at 2 (relating the two objectives put forth in the Spaak Report). These objectives were to develop atomic energy for peaceful purposes and establish a common market in Europe. *Id.*

67. *See id.* (detailing the motivation for serious consideration of the High Authority as the nationalization of the Suez Canal on July 26, 1956 and the sky rocketing oil prices resulting from the canal's blockade).

68. *See* STEINER, *supra* note 2, at 3 (explaining the six original member States were France, Germany, Italy, Belgium, the Netherlands and Luxembourg).

69. *See* MENGOZZI, *supra* note 60, at 3 (pointing out that in 1973, Denmark, Ireland and the United Kingdom became members of the Commonwealth). In 1976 Greece became a member. *Id.* In 1985 and 1986, Spain and Portugal became members. *Id.*; *see also* WYATT & DASHWOOD, *supra* note 21, at 11-12 (explaining that in 1993, applications from Austria, Switzerland, Sweden, Norway, Cyprus, Malta and Turkey were being reviewed by the European Council).

70. *See* WYATT & DASHWOOD, *supra* note 21, at 19 (discussing Article 4 of the EC Treaty as assigning the tasks of the Community to five institutions—a European Parliament, a Council, a Commission, a Court of Justice and a Court of Auditors). The treaty states the powers of these institutions must be express or implied by the treaty. *Id.*

71. *See infra* notes 118-69 and accompanying text (describing the Commission's function and powers generally, and in relation to the regulation of mergers).

72. STEINER, *supra* note 2, at 7.

73. EC TREATY, *supra* note 41, art. 2.

74. *See* EC TREATY, *supra* note 41, art. 3 (listing eleven activities of the EC). The list makes apparent that the free movement of goods and fair competition is the basic part of a real common market. *Id.*

A. Articles 85 and 86 of the EC Treaty

Articles 2 and 3 have played a significant part in the development of case law on competition.[75] However, Articles 85 and 86 contain the substantive law on competition with which this Comment is concerned.[76] The problem encountered with Articles 85 and 86 was a lack of express language applicable to corporate mergers.[77] Over time, the European Commission and the European Court of Justice succeeded in compensating for this absence by broadly interpreting Articles 85 and 86.[78] Article 85 addresses the problem of "cartels"[79] and article 86 addresses the abuse of a "dominant position."[80]

More specifically, Article 85 prohibits, "all agreements between undertakings,[81] decisions by undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction

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75. WYATT & DASHWOOD, *supra* note 21, at 378.

76. *See generally* WILLIAM RAWLINSON & MALACHY CORNWELL-KELLY, EUROPEAN COMMUNITY LAW—A PRACTITIONER'S GUIDE 229-34 (2d ed. 1994) (explaining that Article 85 prohibits unfair business practices which restrict competition and Article 86 proscribes an abuse of a dominant position within the Common Market if it effects trade between Member States). These Articles along with Regulation 4064/89, complete the restrictions contained in the EC Treaty on the behavior of commercial mergers. *Id.*

77. *See* Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13, 16 (1996) (relating that the framers of the EC Treaty believed competition would be best preserved through regulation of mergers after the fact rather than before). The framers viewed mergers as a critical step toward the integration of Member State's economies. *Id.* This view lead to lower concern for the impact mergers would have on the maintenance of competitive market structures. *Id.* Since the founders did not oppose the acquisition of market power through mergers, Articles 85 and 86 were not written as primary instruments for the control of mergers. *Id.*

78. *See id.* at 17 (explaining the goal of Articles 85 & 86 is to preserve competitive market structures). The Commission and the Court of Justice interpreted these provisions to provide corrective rather than preventive measures for regulating mergers. *Id.* Given the size of the typical European firm, cost savings derived from the achievement of economies of scale often lead to a presumption in favor of corporate mergers. *Id.*

79. *See* WYATT & DASHWOOD, *supra* note 21, at 378 (defining a "cartel" as a restrictive agreement or collusion between companies that are economically independent of each other). An example would be an agreement between trade associations representing French and German manufacturers of widgets that each group would stop selling its products on the other's market, thus allowing the domestic producer to control the market. *Id.*; *see also* Bertolini & Parisi, *supra* note 77, at 18 (discussing Article 85 as prohibiting agreement or concerted practice between two or more corporations). Article 85 only applies where there is an agreement or concerted practice between two or more corporations because it is only between such corporations that exist and hence could be restricted. *Id.*

80. *See* WYATT & DASHWOOD, *supra* note 21, at 378-79 (defining "dominant position" as the situation where a single company or group of companies have reached a position of such strength that the normal constraints of the competitive process no longer apply to it); *see also* Bertolini & Parisi, *supra* note 77, at 19 (relating that the applicability of Article 86 to mergers came about from a suggestion that a dominant corporation's acquisition of a competing corporation may violate Article 86). The Court of Justice has stated that if a corporation strengthens its position in the market in such a way that the degree of dominance fetters competition, then that position violates Article 86. *Id.*

81. *See* WYATT & DASHWOOD, *supra* note 21, at 381-82 (explaining that the EC Treaty does not have a definition of "undertaking," but Commission decisions have described an undertaking as any entity carrying on economic activities). A rough synonym would be a "business concern." *Id.*

or distortion of competition within the common market. . . ."[82] The difficulty in applying Article 85 to mergers arises in identifying the purpose and scope of the provision.[83] The European Commission has found Article 85 to be largely inapplicable to full mergers[84] because in a merger, separate corporations cease to exist as separate entities and become one new legal entity.[85] The result is a reduction in the number of competing firms in the market.[86]

Since Article 85 was found to be ineffective in regulating corporate mergers, attention turned to Article 86. In 1966, a Competition Memorandum[87] first suggested to the European Commission that Article 86 applies to mergers by concluding that "a dominant undertaking's[88] acquisition of a competitor might constitute an Article 86 violation."[89] In 1973, *Europemballage and Continental Can v. Commission,*[90] a case addressing the acquisition of a direct competitor by a

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82. EC TREATY, *supra* note 41, art. 85; *see also* RAWLINSON & CORNWELL-KELLY, *supra* note 76, at 230 (describing specific instances of commercial activity prohibited by Article 85: (a) directly or indirectly fixing purchase or selling prices or any other trading conditions; (b) limiting or controlling production, markets, technical development or investment; (c) sharing markets or sources of supply; (d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature according to commercial usage, have no connection with the subject of such contracts).

83. *See* Bertolini & Parisi, *supra* note 77, at 18 (stating that Article 85 may be applicable to joint ventures or to a corporation's acquisition of a minority stake in a competitor when the parties to the agreement continue to exist as separate entities); *see also id.* at 17 n.19 (explaining that a 1996 Commission memorandum analyzed the possible use of Articles 85 and 86 to control merger). The memorandum concluded that Article 85 was inapplicable to full mergers, but left open the possibility of using Article 86. *Id.*; *see also id.* at 18 n.21 (stating the Court of Justice held in Centrafarm BV and De Piejper v. Winthrop BV, 1974 E.C.R. 1183, 2 C.M.L.R. 480 (1974), that Article 85 does not even apply to the relationship between a subsidiary and its parent company).

84. *See* Bertolini & Parisi, *supra* note 77, at 18 (stating that Article 85 may be applicable to joint ventures or to a corporation's acquisition of a minority stake in a competitor when the parties to the agreement continue to exist as separate entities).

85. *See* Bertolini & Parisi, *supra* note 77, at 18 n.21 (relating that the Court of Justice has held that Article 85 does not apply to the relationship between a parent and a subsidiary). In *Centrafarm BV and De Peijper v. Winthrop BV,* 2 C.M.L.R 480 (1974) the court stated Article 85 is not applicable where the agreement between a parent and subsidiary concerns merely the internal allocation of tasks between the corporations, even though a subsidiary has no freedom to determine its course of action. *Id.*

86. Bertolini & Parisi, *supra* note 77, at 18.

87. COMMISSION OF THE EUROPEAN COMMUNITIES, COMPETITION SERIES NO. 3, MEMORANDUM ON THE PROBLEM OF CONCENTRATION IN THE COMMON MARKET COMPETITION SERIES NO.3 (1966) [hereinafter COMMISSION MEMORANDUM].

88. *See* James S. Venit, *The "Merger" Control Regulation: Europe Comes of Age . . . or Caliban's Dinner,* 27 COMMON MKT. L. REV. 7, 20 (1990) (relating the definition of a dominant undertaking as a corporation with the ability to hinder competition through its ability to act independent of its competitors, customers and consumers, and its ability to influence the conditions under which competition will develop even where lively competition exists).

89. *See* Bertolini & Parisi, *supra* note 77, at 17 n.19 (claiming that the Commission Memorandum analyzed the potential application of Articles 85 and 86 to mergers). The memorandum concluded Article 85 was inapplicable to full mergers, but stated Article 86 may be applicable. *Id.*

90. Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215, 1973 C.M.L.R. 199 (1973) (holding that Continental Can, a U.S. manufacturer of metal containers, violated Article 86 by acquiring Thomassen, a Dutch can manufacturer which was a potential rival to Continental Can in the German market).

dominant corporation, confirmed the Commission Memorandum's conclusion.[91] The European Commission argued that *Continental Can*, by eliminating a direct competitor, strengthened its dominant position[92] to such an extent that the possibility of effective competition was eliminated.[93] Siding with the EC, the European Court of Justice upheld Article 86 stating: "abuse may . . . occur if an undertaking in a dominant position strengthens such a position in such a way that the degree of dominance reached substantially fetters competition—i.e., that only undertakings remain in the market whose behavior depends on the dominant one."[94]

Continental Can represented the first step of fundamental change in the evolution of European merger control under the EC Treaty.[95] First, the case established the language of Article 86 encompassed corporate mergers. Second, the case displayed a shift from emphasis on past causal links between the dominant position and past abuses to the potential anticompetitive effects which may result in the future from an already dominant corporation's increased market share.[96] However, this departure from previous interpretations of Article 86 was limited because it required evidence of pre-existing dominance in the relevant market[97] before a finding of

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91. *See* Bertolini & Parisi, *supra* note 77, at 19 (discussing the Commission Memorandum as putting forth the possibility of using Article 86 to evaluate a merger which strengthens a corporation's dominant position). The *Continental Can* decision was based on the application of Article 86 and therefore solidified the hypothesis put forth in the Commission Memorandum. *Id.*

92. *See* WYATT & DASHWOOD, *supra* note 21, at 438 (quoting a famous passage from *Continental Can* in which the Commission stated, "[u]ndertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers, or suppliers"). "That is the position when, because of their share of the market, or of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the products in question." *Id.* "This power does not necessarily have to derive from an absolute domination permitting the undertakings which hold it to eliminate all will on the part of their economic partners, but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour[sic], even if there are differences in intensity in their influence on the different partial markets." *Id.*

93. *See* EC TREATY, *supra* note 41, art. 86 (quoting "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between member States"). Such abuse may consist by: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. *Id.*

94. *Continental Can*, 1973 E.C.R. at 245.

95. Bertolini & Parisi, *supra* note 77, at 20.

96. Bertolini & Parisi, *supra* note 77, at 20; *see also Continental Can*, 1973 E.C.R. at 245 (stating "[t]he question of the link of causality . . . is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty, regardless of the means and procedure by which it is achieved if it [eliminates any possibility of effective competition]").

97. *See generally Continental Can*, 1973 E.C.R. at 247 (explaining the relevant market in each particular case is determined by the European Commission); *see also* RAWLINSON & CORNWELL-KELLY, *supra* note 76, at 235 (describing two factors the courts use to discern relevant market: (1) any discrete geographical market in existence; (2) the economic market for the product under examination or any product which is functionally

abuse could be found in the strengthening of that dominant position.[98] Consequently, mergers between two or more non-dominant corporations creating a dominant position in the relevant market remained outside the reach of the EC Treaty's antitrust provisions. Additionally, neither Article 85 nor Article 86 resolved the problem of mergers creating or enhancing a collective dominant position.[99]

B. *The Merger Regulation No. 4064/89*

In 1972,[100] negotiations began to solve the dissatisfaction[101] with the way in which Articles 85 and 86 dealt with mergers.[102] The Commission first introduced a draft merger control regulation in 1973 requiring unanimous approval from all Member States before becoming effective.[103] The draft regulation was not well received by Member States and was blocked for over fifteen years.[104] This was

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interchangeable with it. However, whether a dominant position existed in a given relevant market is a question of fact and degree in all the circumstances, and there is no fixed percentage or proportion which is decisive).

98. *See* Bertolini & Parisi, *supra* note 77, at 20 (explaining that even after *Continental Can,* Article 86 is still only relevant when it is necessary to correct a corporation's abuse of a dominant position once the abusive behavior has taken place).

99. *Id.* at 20; *see also id.* at 20 n.32 (stating that the inefficiency of Article 86 is evident by the fact there are no formal EC decisions, notwithstanding the Commission's repeated efforts to attack concentrations on the basis of the provision).

100. *See* William Elland, *The Mergers Control Regulation(EEC) No. 4064/89,* 3 EUR. COMPETITION L. REV. 111 (1990) (stating that in 1972, Heads of State following an EC Summit Conference in Paris issued the following statement: "The Heads of State or of Governments consider it necessary to seek to establish a single industrial base for the Community as a whole). This involves a formulation of measures that ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaties."*Id.*

101. *See id.* at 112 (discussing seven pressing reasons for the Merger Regulation: (1) Article 86 could only be applied *ex post facto* as illustrated by the Commission's intervention in the British Airways takeover of British Caledonian; (2) Exemption under Regulation 17 could only apply indefinitely; (3) An exemption under Article 17 could not necessarily be retrospective leaving the merger open to challenge in the domestic courts while it was being considered by the Commission; (4) The law pending the regulation of mergers was confused and uncertain; (5) Industry would be at the mercy of differing national rules in respect to cross-frontier takeovers; (6) It was necessary to make European industry more competitive with the American and Japanese conglomerates; (7) The 1992 programs made such a measure a major political objective).

102. *See* Jean-Marc Le Bolzer, *The New EEC Merger Control Policy After the Adoption of Regulation 4064/89,* 14 WORLD COMPETITION L. & ECON. REV. 31, 32 n.6 (1990) (explaining the EE uses "Concentration" as a term of art which designates all the operations resulting in one corporation taking control of another). This article will use the term "merger" concurrently. *Id.*

103. *Id.* at 31.

104. *See* Elland, *supra* note 100, at 111 (discussing the first draft of the new mergers control regulation). After the draft was rejected in 1973, it slipped from the agenda until 1982 when a new draft was proposed. *Id.* This was followed by a further draft in 1984, 1986 and three in 1988 under the energetic Peter Sutherland, then Commissioner for Competition. *Id.* With each amendment, the threshold at which a merger would be caught by the Regulation was raised or compromises were made to suit national sensibilities. *Id.* The first major breakthrough came at a meeting of the Council of Ministers on December 21, 1988, when following further concessions to national sensibilities, the council of Ministers announced they had reached agreement in principle for the

primarily a result of the Member States' reluctance to relinquish jurisdiction over mergers that could have local consequences.[105] Finally, on December 21, 1989,[106] the Council of Ministers adopted Regulation 4064/89[107] (the Merger Regulation). This regulation requires prior notification to the Commission and control by the Commission of mergers which come within the Merger Regulation's scope.[108] The Merger Regulation, which became effective on September 21, 1990, receives its authority from Article 235 of the EC Treaty[109] and creates new substantive rules extending beyond Articles 85 and 86.[110]

The Merger Regulation is intended to provide a bright line between those mergers which are to be assessed by the competition authorities of the individual EC Member States, and those mergers which are to be investigated by the Commission.[111] The mergers falling under the jurisdiction of the Commission are comprised of essentially large, international mergers.[112] The Merger Regulation provides the criteria against which these mergers are to be assessed.[113]

The rationale for the Merger Regulation is two-fold.[114] First, duplication is avoided by allowing a Community-wide body to oversee merger control rather than

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Commission to draw up a regulation. *Id.*

105. Le Bolzer, *supra* note 102, at 31; *see also* WYATT & DASHWOOD, *supra* note 21, at 499 (relating that opposition to the Merger Regulation meant that compromise was necessary to gain acceptance of the regulation). Such compromise weakened the impact the Merger Regulation would have by allowing individual countries to still exercise power over mergers not large enough to come under the Merger Regulation. *Id.*

106. *See* Elland, *supra* note 100, at 111 (discussing the fact that throughout 1989, smaller Member States were eager for a tough low threshold regulation because those States had no effective merger controls and so the Community mergers regulation would have been of great assistance). The larger States with highly developed domestic regulatory control were reluctant to see their domestic control of mergers transferred to Brussels. *Id.*

107. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1 corrected version at 1990 O.J. (L 257) 13 [hereinafter Merger Regulation].

108. *See* Venit, *supra* note 88, at 7.

109. *See id.* at 7 n.3 (reciting Article 235 as providing, "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.").

110. *Id.* at 7.

111. Derek Ridyard, *An Economic Perspective on the EC Merger Regulation*, 6 EUR. COMPETITION L. REV. 247 (1990).

112. *Id.*; *see also* Siun O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulation 4064/89*, 1 EUR. COMPETITION L. REV. 21 (1994) (explaining that under the Merger Regulation, only mergers with a Community dimension are required to notify the Commission). These mergers will involve large corporations since their combined world wide turnover must be at least ECU 2 billion (equaling US$2,298,850,575). *Id.* These mergers will be international because the Merger Regulation is not applicable when the merged corporations achieve more than two thirds of their combined Community-wide turnover in the same Member State. *Id.* *But see* European Parliament, *Resolution on Community Merger Control: Green Paper on the Review of the Merger Regulation*, COMMISSION OF THE EUROPEAN COMMUNITIES, 1996 O.J. (C 362) [hereinafter *Green Paper*] (explaining the Commission lowered the world-wide turnover threshold from ECU 5 billion to ECU 2 billion).

113. Ridyard, *supra* note 111, at 247.

114. *Id.* at 248.

individual Member States.[115] This is referred to as the "one stop-shop" approach.[116] Second, the Merger Regulation moves the EC closer to a single European Market.[117]

IV. THE ROLE OF THE EUROPEAN COMMISSION UNDER THE MERGER REGULATION

The European Commission's duties and responsibilities place it solidly at the center of the European Community's policy making process.[118] In some respects, it acts as the heart of Europe, from which the other European Community institutions derive much of their energy and purpose.[119] The Commission is composed of 20 members who meet twice a week to conduct business which may include adopting proposals, finalizing policy papers and discussing the evolution of its priority policies.[120]

The members are nominated by common agreement of the Member State governments for a term of five years.[121] They are required to be persons, "whose independence is beyond doubt."[122] Additionally, the EC Treaty provides that they, "shall, in the general interest of the Communit[y], be completely independent in the

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115. *See id.* (citing an example of a negative merger situation problem the Merger Regulation is designed to resolve). Three airlines, British Airways, KLM and Sabena sought to attain common ownership interests between the corporations. *Id.* Britain cleared the deal, but their inquiry was only into the part of the deal impacting Britain. *Id.* Investigation into only one part of a merger cannot serve EC interests since the impact is Community wide. *Id.* The argument is that this is certainly a case where a Community perspective is required. *Id.*

116. *See id.* (stating the 'one stop-shop' approach allows for less delay, less costs and clear signals since the merging companies do not have to obtain multiple clearance from different Member States). A unified approach is clearly preferred to the situation in which separate inquiries are conducted by different Member State authorities, each judging the merger on the basis of partial information and against slightly different criteria. *Id.*

117. *See id.* (pointing out as barriers to trade are relaxed, the likelihood that the relevant economic market definition is European rather than national increases). As a result, the advantages of taking a Community perspective are multiplied. *Id.*

118. *The European Commission* (visited Oct. 11, 1997) <http://europa.eu.int/inst/en/com.htm#intro>; *see also* STEINER, *supra* note 2, at 17 (explaining the Commission has been described as the 'guardian of the Treaties').

119. *See The European Commission*, *supra* note 118 (discussing that the Commission is frequently the beginning of further integration throughout the EC). The Commission was decisive in the completion of the single market in 1993 and reflects the Commission's determination to solidify economic and social cohesion throughout Europe. *Id.*

120. *See id.* (noting there are two from France, Germany, Italy, Spain, and the United Kingdom and one from each of the other Member States). Without the 20 men and women who are its members and the 15,000 staff who serve it, the Union would not work. *Id.* The Council and the European Parliament need a proposal from the Commission before they can pass legislation. *Id.* The Commission, in close collaboration with the European Council, frequently provides the impulse towards further European integration when it is needed. *Id.* Decisive initiatives in recent years have been launching the strategy which culminated in the completion of the single market in 1993. *Id.* The Commission's role in drawing up a blueprint for economic and monetary union and its drive to strengthen economic and social cohesion between the regions of Europe has proven the leadership and the direction the Commission provides the European Community. *Id.*

121. *See* STEINER, *supra* note 2, at 17 (relating that Commission members were originally appointed for a term of four years, but the term was increased to five years and is renewable).

122. EC TREATY, *supra* note 41, art. 157(1).

performance of their duties."[123] Commission members may not seek or take instructions from any government or other body.[124] The requirement of majority rule in the Commission provides a further assurance that its decisions will not reflect particular national viewpoints.[125] The Commission's independence, also guaranteed by the fact that its members are not formally considered representatives of the Member States, does not, however, prevent the Commission from being subject to control by the Parliament[126] and the Court of Justice.[127]

A. *The Scope of the European Commission's Power over Mergers*

The European Commission polices the single market to ensure its benefits reach the ordinary citizen.[128] The Commission has extensive powers to investigate possible breaches of the competition laws and since 1989 has also been authorized to scrutinize and block large-scale corporate mergers under the Merger Regulation.[129] EC Treaty Article 155 delegates to the Commission a series of broad powers, "to ensure the proper functioning and development of the common market."[130] In essence, Article 155 states the Commission shall ensure the provisions of the EC Treaty are applied pursuant to the Treaty; deliver opinions on matters dealt with in the Treaty; decide and participate in the shaping of measures taken by the European Council and by the European Parliament; and exercise the power conferred by the European Council to implement rules laid down by the European Council.[131] Additional powers delegated to the European Commission include: "(a) participation in the exercise of the Community normative function; (b) specific implementation of EC Treaty provisions and exercise of powers granted by Community acts (common policies and safeguard clauses); (c) financial manage-

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123. *Id.* art. 157(2).

124. MENGOZZI, *supra* note 60, at 30.

125. WYATT & DASHWOOD, *supra* note 21, at 27.

126. *See* STEINER, *supra* note 2, at 13 (noting Parliament exercises direct political control over the Commission). "Commissioners must reply orally or in writing to its questions." *Id.* "The Commission must publish a general report which is discussed in Parliament in open session." *Id.* "Parliament meets members of the Commission in committees, and in practice, though this is not required by law, members of Parliament are consulted by the Commission at the pre-legislative stage." *Id.* Parliament also has the power to dismiss the Commission, by passing a vote of censure although it has no say in the reappointment of Commissioners. *Id.* Such a motion has been tabled, but never carried. *Id.*

127. *See* STEINER, *supra* note 2, at 19 (stating that the role of the European Court of Justice is to 'ensure that in the interpretation and application of this Treaty the law is observed' (Article 164)).

128. *See Competition* (visited Oct. 11, 1997) <http://europa.eu.int/pol/comp/en/comp.htm> (stating the Member States enforce their national competition laws through their own authorities, but the Commission ensures the benefits of competition reach the ordinary citizen). The benefits to the consumer of a competitive market are a wide choice of goods and services at a lower price. *Id.* Competition encourages the market to focus on quality, innovation and consumer's needs. *Id.*

129. *Id.*

130. WYATT & DASHWOOD, *supra* note 21, at 28. *See id.* (claiming Article 155 sets forth the various elements which define the complex role of the Commission).

131. EC TREATY, *supra* note 41, art. 155.

ment; (d) oversight of the application of the Treaty provisions and Community acts; and (e) international representation of the European Community."[132]

The classic description of the Commission's role identifies three functions: initiating proposals for legislation; guardian of the Treaties; and, the manager and executor of EC policies and of international trade relationships.[133] A closer look at these functions reveals the European Commission is both the "maker" and "enforcer" of laws.[134] This situation is against the doctrine of "separation of powers"[135] which is the foundation of other democratic representative governments.[136] In the case of the Commission regulating competition, there is doubt whether there is a meaningful check on the use or abuse of such power.[137]

The adoption of the Merger Regulation represents a significant increase of the Commission's powers and a major extension of Community law.[138] The Merger Regulation greatly expands the Commission's power since it excludes application of national competition law, requires mandatory prior notification to the Commission of all mergers and permits the Commission to prohibit concentrations that create, as well as strengthen, a dominant position.[139] The Commission currently reviews approximately 72 cases per year and expects to apply the Merger Regulation to about 65-80 additional cases per year.[140] The number shall not exceed 200

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132. MENGOZZI, *supra* note 60, at 30.

133. *The European Commission*, *supra* note 118 (stating that in fulfilling these functions, the Commission constantly seeks to keep the needs of the ordinary citizen firmly in mind and to keep red tape and bureaucratic regulations to a minimum).

134. *See* STEINER, *supra* note 2, at 17-18 (describing the Commission's power to include all three branches of government: executive, judicial and legislative). The Commission holds executive power because once a policy decision has been made, the implementation of such is left to the Commission. *Id.* The Commission has judicial power since Article 155 states the Commission has the 'power of decision' to enforce competition policy. *Id.; see also* WYATT & DASHWOOD, *supra* note 21, at 377 (explaining the legislative procedure within the EC to require different institutions to contribute). The legislative process begins with a proposal by the Commission. *Id.* The Commission is expressly empowered to alter its proposal at any time during the procedure. *Id.*

135. *See* ARTHUR T. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 50 (1953) (quoting James Madison writing in the *Federalist* saying: "[t]here can be no liberty [or justice] where the legislative and executive powers are united in the same . . . body of magistrates, or, if the power of judging [is] not separated from the legislative and executive powers").

136. *See generally id.* at 7-34 (discussing how countries other than the U.S. have integrated the doctrine of separation of powers into their governments).

137. *See* H. Thomas Hefti, *European Union Competition Law*, 18 SETON HALL LEGIS. J. 613, 616 (1994) (acknowledging that the European Court of Justice has proven to be a strong supporter of Commission decisions); *see also* WYATT & DASHWOOD, *supra* note 21, at 30 (relating the Commission's broad power over competition was delegated by the Council).

138. Venit, *supra* note 88, at 9.

139. *See id.* at 11; *see also* the Amended Regulation (EEC) No. 4064/89, 1997 O.J. (L 180) (lowering the monetary threshold for application of the Merger Regulation, thus giving the Commission the power to decide the compatibility of a larger number of mergers); *see also* Elland, *supra* note 100, at 117 (stating Article 22(3) of the Merger Regulation, the "Dutch Clause," gives the Commission the power to intervene at the request of the Member States where the proposed merger does not reach the monetary threshold for application of the Merger Regulation). For underdeveloped countries, this may well be a major weapon in warding off foreign takeover bids. *Id.*

140. *Green Paper*, *supra* note 112.

cases a year under newly approved thresholds of ECU 2 billion world-wide turnover and ECU 100 million Community-wide turnover.[141]

Under Article 8(2), the Commission, finding a proposed merger incompatible with EC goals and objectives, may accept modifications by undertakings concerned and declare the merger compatible.[142] Under the same provision, the Commission may attach conditions and require concessions to be given,[143] as in the case of the Boeing and McDonnell Douglas merger.[144]

More importantly, Article 8(4) of the Merger Regulation allows the Commission to declare a merger incompatible with the EC and order divestiture of the assets or order cessation of joint control or "any other action that may be appropriate in order to restore conditions of effective competition."[145] With the Commission playing the dual role of "maker" and "enforcer" of rules,[146] there remains the ever present danger that acquisitive companies based outside the EC may find the provisions of the Merger Regulation act against them.[147] It is possible that the Commission will be more prone to upholding Member State's public interest objections to mergers if the bidder is a US or Japanese firm than one based in the EC.[148] Under the "effects doctrine," a state is entitled to assert jurisdiction with respect to activities abroad where these activities produce effects felt within a state's own territory.[149] The United States has lead in the assertion of the "effects

141. *Id.*. *See also* Council Regulation (EC) No. 1310/97, 1997 O.J. (L 180) Amending Regulation (EEC) 4064/89, June 30, 1997, art. 3 (stating that the amended version of the Merger Regulation is to take effect March 1, 1998); *see also Boeing Files McDonnell Deal for EU Approval*, REUTER EUR. COMMUNITY REP., Feb. 20, 1997 (stating that US$1 equals approximately 0.87 ecus, or European Community Units, which means that the ECU 2 billion world-wide turnover threshold is approximately US$2,298,850,575 and the ECU 100 million European turnover threshold is approximately US$114,942,500).

142. Elland, *supra* note 100, at 115.

143. *Id. See also The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, COMMISSION OF THE EUROPEAN COMMUNITIES, July 30, 1997 [hereinafter *Commission Clears*] (explaining there were concessions on the part of Boeing to gain approval of the Commission for their merger with McDonnell Douglas).

144. *See infra* notes 247-309 and accompanying text (discussing the Boeing and McDonnell Douglas merger in general and the Commission's decision to approve the merger, but only after it had sufficiently protected its own interest, Airbus Industries).

145. *See* Elland, *supra* note 100, at 115 (making the significant statement, 'In other words, [the Commission's] powers are enormous); *see also* RAWLINSON & CORNWELL-KELLY, *supra* note 76, at 237 (stating that following an investigation, the Commission may require a company to adopt a course of action designed to remedy any breach of Community law thereby established). Fines may be imposed for non-compliance with a Commission decision or for supplying false or misleading information to the Commission or for obstructing an investigation. *Id.*

146. *See supra* notes 133-37 and accompanying text (exploring the three functions of the Commission and concluding the Commission is a maker and enforcer of EC law).

147. Ridyard, *supra* note 111, at 252.

148. *Id.*

149. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(C) (1987) (stating under the effects doctrine, a nation has jurisdiction to apply its own law to actions occurring outside its territory which is "intended to have substantial effect within its territory"); *see also* WYATT & DASHWOOD, *supra* note 21, at 386-87 (stating the effects doctrine is a controversial basis for the extra-territorial application of EC

doctrine" and how far the effects doctrine has been received into competition law in the EC remains to be seen.[150] However, there has been some indication that the doctrine is alive and well in the EC based on some recent Commission decisions.[151]

Additionally, there is the fear that the Commission may use its discretion in defining "market dominance" to encourage the development of large European corporations with the ability to match the large corporations in the US and Japan.[152] These corporations are known as "European Champions." Many argue this is precisely the case in the Commission's decision regarding the Boeing and McDonnell Douglas merger.[153] In this area, the Commission may find it hard to resist the temptation to use its competition policy to pursue wider policy goals.[154] The current Vice President of the Commission of the European Communities responsible for Competition Policy and Financial Institutions, Karel van Miert, made it clear in February of 1993 in his first speech on competition policy that it will no longer be prudent to assume that mergers will be judged by competition policy alone.[155] A few statements from his speech are indicative of his views: competition policy "[c]annot be . . . applied without reference to the legal, economic, political and social context" or "be determined by dogmatism;" EC industry "[m]ust be able to compete on a world stage" and competition policy must facilitate a "realignment and restructuring of industry."[156] The difficult task for corporations abroad is determining what impact these beliefs will have on their future merger plans.[157]

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competition law).

150. *See* United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945) (quoting the Honorable Learned Hand saying, "[i]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders").

151. *See generally Commission Clears, supra* note 143 (discussing the most recent application of the "effects doctrine" in the Boeing / McDonnell Douglas merger).

152. *See* Ridyard, *supra* note 111, at 252.

153. *See* Stanley Holmes, *Airbus Blasts Boeing—War of Words Over Merger Plan Fills the Skies at Paris Air Show*, THE SEATTLE TIMES, June 16, 1997, at A1 (claiming that Airbus, a four-nation consortium and Boeing's chief competitor, accused Boeing and McDonnell Douglas of conspiring with the U.S. government to destroy Airbus).

154. *See* Ridyard, *supra* note 111, at 252 (stating that the temptation of the Commission to use its competition policy to pursue wider policy goals is particularly so since the line between strategic considerations and competition considerations is frequently a difficult line to draw).

155. *See* John Davies & Chantal Lavoie, *EEC Merger Control: A Half-Term Report Before the 1993 Review?*, 16 WORLD COMPETITION L. & ECON. REV. 27, 28 (1993) (discussing the possibility that industrial, economic or social issues could be used to measure the significance of a merger). Prior to van Miert, competition policy was paramount. *Id.* But there was the possibility that the Commission would draw comfort from Recital 13 of the Merger Regulation which states that in evaluating a merger, the need for 'strengthening the Community's economic and social cohesion' must be taken into account. *Id.*

156. *Id.*

157. *See generally* Siun O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-dimension Thresholds in Regulation 4064/89*, 1 EUR. COMPETITION L. REV. 21 (1994) (stating merger control is a particularly sensitive area internationally, and the EC is likely to encounter turbulence if it pursues too vigorously, long-range political aims that have a structural impact).

B. Judicial Limitation of the European Commission's Power

The Court of Justice is the supreme authority on all matters of European Community law,[158] and in this capacity may be required to decide matters of constitutional, administrative, social and economic law.[159] The Court of Justice has jurisdiction over the European Commission pursuant to Article 173.[160] Article 173 contemplates review of the legality of Council and Commission binding acts.[161]

In order to meet the increasing workload of the Court of Justice, a new court known as the Court of First Instance, was approved in October 1988.[162] The Court of First Instance commenced proceedings on September 1, 1989.[163] Its jurisdiction is confined to disputes between the community and its servants (staff cases),[164] cases involving EC competition law, and applications for review under the ECSC.[165] There is a right of appeal on matters of law from this court to the Court of Justice.[166]

At first glance, the Court of Justice appears to be a valid check on the Commission's power to regulate competition. However, in practice, the Court of Justice has proved to be a powerful and efficient ally of the Commission.[167] It has upheld most of the Commission's decisions in competition matters that were motivated by the intention to promote the integration of the Member State's economies into a common single market.[168]

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158. *See* MENGOZZI, *supra* note 60, at 51-52 (stating the residual powers of the Member States are slowly being eroded by the rising tide of Community powers). And this is because, as the Court of Justice expressed, it is not possible to prevent the jurisdiction of the Community from impinging "[o]n national sovereignty in cases where, because of the power retained by the Member States, it is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised." *Id.*

159. *See* STEINER, *supra* note 2, at 19 (relating that the Court of Justice draws on principles and traditions from all Member States in developing the substantive law).

160. *See* L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 125 (1994) (explaining Article 173 allows the Court of Justice to review "[a]cts . . . adopted by . . . the Commission . . . other than recommendations or opinions"). However, the Court of Justice has taken a liberal view of this language and only required an act binding in law. *Id.* The Court will look beyond the face of an act to its substance. *Id.*

161. MENGOZZI, *supra* note 60, at 37.

162. STEINER, *supra* note 2, at 20; *see also* BROWN & KENNEDY, *supra* note 160, at 70-71 (relating one of the reasons for the creation of the Court of First Instance was the increasing complexity of cases was leading to inadequate fact finding capacity in the Court of Justice).

163. STEINER, *supra* note 2, at 20.

164. *See* BROWN & KENNEDY, *supra* note 160, at 70 (defining staff cases as disputes between officials of the Community institutions and those institutions themselves in their capacity as employers).

165. STEINER, *supra* note 2, at 20.

166. *See* BROWN & KENNEDY, *supra* note 160, at 90-91 (relating that inherent in the two tier judicial system is that decisions by the Court of First Instance are subject to appeal to the Court of Justice). However, the Court of First Instance is aware that if too many cases are appealed to the Court of Justice, the purpose of having the Court of First Instance is frustrated. *Id.*

167. Hefti, *supra* note 137, at 616.

168. *See* Hefti, *supra* note 137, at 616 n.17 (stating the Court of Justice rarely invalidated a Commission decision in a competition issue). Since the establishment of the Court of First Instance, this is changing because this court is more critical of Commission decisions relating to competition. *Id.*

In the end, a merging corporation must fully weigh the costs of the strategy to appeal a Commission decision. Not only must a corporation who does not agree with the Commission have to litigate in a foreign legal system and bear those legal costs, but a corporation must also consider the impact of the time required to fully litigate a merger. The time delay in approval of the merger may have a significant impact on one or both of the merging companies' ability to survive financially. This delay, combined with the financial instability of one or both of the merging corporations, could leave the corporations no choice but to accept the Commission's decision to deny the merger altogether, or to require concessions from the merging companies, as was the case in the Boeing and McDonnell Douglas merger.[169] Ultimately, the costs of litigation prove to be a powerful tool for the Commission to promote acquiescence to their demands for corporate concessions.

V. APPLICATION OF THE MERGER REGULATION

In order to properly analyze the application of the Merger Regulation in the Boeing and McDonnell Douglas merger, it is important to understand the criteria for its application. In broad terms, the Merger Regulation represents the EC's intent to provide a unitary system of control for mergers with a significant Community impact.[170] This system is based on pre-notification to the Commission for evaluation and a recommended course of action.[171] This section discusses the qualifying conditions which must be satisfied before the Merger Regulation is applied.[172] Additionally, this section explains the notification procedures, the Commission's appraisal process and the exceptions to the application of the Merger Regulation.[173]

A. *The Two Part Test for the Application of the Merger Regulation*

To trigger the application of the Merger Regulation there must be a concentration having a Community dimension.[174] Two tests have been enumerated to determine whether a concentration has a Community dimension. The first is the "concentration" test which is concerned with the structural alteration that is being

169. *See infra* notes 262-73 and accompanying text (relating the Commissions objections to the Boeing and McDonnell Douglas merger and Boeing's concessions given to satisfy the Commission's concerns).

170. *See supra* notes 100-17 and accompanying text (discussing the development and goals of the Merger Regulation).

171. *Id.*

172. *See infra* notes 174-96 and accompanying text (relating the two tests which must be met in order to apply the Merger Regulation: the Concentration test and the Community Dimension test).

173. *See infra* notes 197-211 and accompanying text (explaining the role of notification, the Commission's appraisal process under Article 2 and situations where the Merger Regulation may not apply).

174. *See* Ridyard, *supra* note 111, at 247-48 (pointing out that Article 1 sets out minimum turnover criteria to determine Community dimension). These criteria define mergers with a Community dimension to include large, trans-EC mergers. *Id.*

achieved.[175] Second, the "Community dimension" test is directed towards the economic significance and international character of the parties.[176] Essentially, both tests must be satisfied in order for the Commission to apply the Merger Regulation to a corporate merger.[177]

1. *The Concentration Test*

The Merger Regulation defines a concentration as the taking of control of one company by another, allowing for the exercise of a decisive influence over the former company.[178] Basically, a concentration is a lasting change of control.[179] The idea of control includes the ownership or the right to use all or part of the assets of another corporation, or the rights or contracts which confer decisive influence on the composition, voting or decisions of another corporation.[180]

Article 3 of the Merger Regulation states "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."[181] The article finds a concentration to exist where: (a) two or more previously independent undertakings merge, or (b) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings.[182]

Although the definition adopted by the Regulation is narrow, it is difficult to determine where to draw the line.[183] Given the onerous consequences of not

175. WYATT & DASHWOOD, *supra* note 21, at 499.

176. *Id.* at 502.

177. *See id.* at 499 (explaining that the Merger Regulation only applies where there is a "concentration" and that concentration has a "Community dimension").

178. Marc Picat & Jacques Zachmann, *Community Monitoring of Concentration Operations: Evaluation after over Two Years' Application of Regulation 4064/89*, 6 EUR. COMPETITION L. REV. 240, 250 (1993).

179. Morten P. Broberg, *Merger Control in the European Community—A Summary of the Five Years since the Introduction of the Merger Regulation*, 19 WORLD COMP. L. & ECON. REV. 5 (1995) (stating that a concentration is a "durable" change of control and that in order to find a concentration, it must first be found that the control over some economic activity has changed and second that it must be ascertained that this is a "durable" change.)

180. Le Bolzer, *supra* note 102, at 37.

181. Merger Regulation, *supra* note 107, at 13, art. 3.

182. *Id.*

183. *See* Le Bolzer, *supra* note 102, at 37 (discussing the definition of concentration and pointing out that the catch all phrase "any other means conferring decisive influence on an undertaking" could lead to some regrettable uncertainty about the need to notify some transactions that are not concentrations by nature). For example, the acquisition of a minority share holding could constitute a concentration if it is combined with a "buy-out" clause or co-operation arrangements. *Id.*

notifying the Commission of a merger, companies in boarder line cases should incur the expense and notify the Commission of their agreement.[184]

2. *Community Dimension Test*

Under the Merger Regulation, the Commission has exclusive jurisdiction to assess those mergers with a 'Community dimension.'[185] For a merger to have a Community dimension, the merger must be large and it must be what the EC considers international.[186] The Commission can only examine this operation under the Merger Regulation and not Articles 85 or 86[187] and only apply the Merger Regulation if the concentration has a "Community dimension."[188] Since the power given to the Commission is at the expense of the Member States, the notion of Community dimension has been a stumbling block in the negotiations between the EC Member States since it determines the scope of the Merger Regulation.[189]

A merger has a Community dimension if it fulfills three criteria: (1) the participants exceed an absolute size: the world-wide sales of all the companies involved in the merger must exceed ECU 2.5 billion; (2) the companies involved must have a significant presence in the EC: at least two of the merging companies have Community-wide sales of ECU 100 million each; and (3) the trade between Member States is significantly affected by the concentration: each of the companies achieves less than two-thirds of its aggregate sales within one and the same Member

184. *See id.* (recognizing there is a need for corporations in the process of merging to notify the Commission, but also recognizing the need in the Merger Regulation for some safe-harbor provisions in the guidelines for those corporations who in good faith fail to notify the Commission). The article points to Article 3.5 of the Merger Regulation as an example of explicit guidelines. *Id.* Article 3.5 states that the Merger Regulation does not apply under certain conditions to: (1) financial institutions holding securities on a temporary basis, as passive investments; (2) acquirors of companies in bankruptcy proceedings; (3) financial holding companies which do not determine the competitive conduct of the companies in which they have holdings. *Id.*

185. *See* Broberg, *supra* note 179, at 10 (explaining that once a concentration has an impact within the EC above a minimum threshold, the Commission uses the Merger Regulation to determine whether the merger is consistent with European competition policy).

186. *See* Ridyard, *supra* note 111, at 247-48 (explaining the Commission has adopted turnover criteria to define which mergers are 'large' and which mergers the EC considers 'international'); *see also* Elland, *supra* note 100, at 112 (relating the principle of the Merger Regulation is to separate the large mergers for the Commission to review, and the small mergers for the national authorities to review).

187. *See* Broberg, *supra* note 179, at 23 (stating the Commission no longer applies Articles 85 and 86 to mergers). Additionally, Article 22(1) of the Merger Regulation says, "[t]his Regulation alone shall apply to concentrations." *Id.*

188. *See* WYATT & DASHWOOD, *supra* note 21, at 502 (stating this criteria is directed toward the international character and economic significance of the merging corporations).

189. Le Bolzer, *supra* note 102, at 37; *see* also Elland, *supra* note 100, at 111 (pointing to the fact that during negotiations for the Merger Regulation, Italy and several of the smaller Member States were eager for a tough low threshold regulation to be imposed as soon as possible because they did not have effective merger controls and so a Community merger regulation would have been of great assistance). On the other hand, countries with highly developed domestic regulatory controls and in particular Great Britain and Germany were reluctant to see their domestic control of mergers transferred to the European Community. *Id.* Initially, Germany held out for a threshold of 10 billion ECU's below which a merger would be subject to domestic merger regulations. *Id.*

State. Nonetheless, it is not required that the companies involved have their main field of activities in two different Member States.[190] It is thus size and the Community impact of the activity which combine to form the requisite significance of a concentration.[191]

Calculation of turnover[192] is set out in detail in the Merger Regulation.[193] The extent to which the criteria for calculating turnover amount to confirmation of the European Court's extraterritorial jurisdiction is not clear.[194] It is apparent from the Boeing and McDonnell Douglas merger, that the application of the Merger Regulation does not require the corporations involved to have a legal presence in the Common Market.[195] Recital 11 of the Merger Regulation, after finding the necessary Community dimension, states: "whereas this is also the case where the concentrations are effected by undertakings which do not have their principle fields of activities in the Community but which have substantial operations there."[196]

B. Prior Notification by Merging Corporations and Time Limits

The Merger Regulation's aim is to intervene between concentrations before they complete their merger, and to reach a decision as quickly as possible regarding the validity of the merger, without imposing unrealistic limitations on market transactions.[197] Therefore, the Merger Regulation does not require notification before the conclusion of the agreement, nor prohibit the continuation of a tender offer during the period the corporation is waiting for a Commission decision.[198] However,

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190. Merger Regulation, *supra* note 107, at 13, art. 1(2); *see also* Broberg, *supra* note 179, at 10 (stating the Green Paper adopted by the Commission on January 31, 1996 recommended a lowering of the threshold to ECU 2 billion world-wide and ECU 100 million Community-wide). In the Green Paper, the Commission again points to a lowering the thresholds to this level while it agrees to maintain the two-thirds rule. *Id.* This will give the Commission broader scope to apply the Merger Regulation. *Id.*; *see also* Council Regulation 1310/97 Amending Regulation 4064/89 on the Control of Concentrations between Undertakings, 1997 O.J. (L180) 1, arts.1 & 3 (stating the amended Merger Regulation is to take effect March 1, 1998 and it shall lower the threshold for application of the Merger Regulation to world-wide ECU 2.5 billion and Community-wide ECU 100 million).

191. *See* WYATT & DASHWOOD, *supra* note 21, at 502 (relating that these figures were determined through negotiation and compromise between the Member States and the Commission.) There are review periods placed in the Merger Regulation for periodic adjustments of these threshold figures. *Id.*

192. *See id.* (confirming that turnover is defined as the total combined value of sales and services of the merging companies less taxes and sales rebates).

193. Merger Regulation, *supra* note 107, at 13, art. 5.

194. *See* O'Keeffe, *supra* note 157, at 30 (claiming the clever manner in which the Commission calculates turnover leaves the precise meaning of 'Community dimension' highly unpredictable).

195. *See* WYATT & DASHWOOD, *supra* note 21, at 502-03 (suggesting the Merger Regulation does not require the undertakings to have a legal presence in the Common Market); *see generally* Commission Decision, Case No. IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) (displaying an example of two corporations who are registered legal entities in the U.S., but have not taken action to be legally registered in the EC).

196. Merger Regulation, *supra* note 107, at 13, recital 11.

197. Le Bolzer, *supra* note 102, at 39; *see also* WYATT & DASHWOOD, *supra* note 21, at 503 (relating the purpose of the notification requirement is to enable the Commission, under Article 2(2) of the Merger Regulation, to establish whether a merger is compatible with the European market).

198. Le Bolzer, *supra* note 102, at 39.

Article 7 of the Merger Regulation does provide that a merger can "not be put into effect either before its notification or within the first three weeks following its notification."[199]

A merger with Community dimension must notify the Commission not more than one week after the conclusion of the merger agreement, or the announcement of the public bid, or the acquisition of a controlling interest, which ever comes first.[200] When the Commission receives a notice of merger, it must carry out a first-phase examination and issue a first-phase decision within one month.[201] There are three possible outcomes of the first-phase examination: (1) the merger does not come within the jurisdiction of the Commission; (2) the Commission has jurisdiction, but it does not warrant further investigation and is thus cleared; or (3) the Commission has jurisdiction and second-phase investigation is required.[202]

If a second-phase investigation is required, the Commission's investigation may last for months.[203] The second-phase consists of four stages. First, the Merger Task Force of the Commission will carry out a careful examination of the merger, and if necessary issue a statement of objections.[204] Next, the merging corporations are asked to submit their observations on the statement of objections.[205] Third, the Merger Task Force will prepare a draft decision which is submitted for discussion to an Advisory Committee made up of representatives of the Member States.[206] Finally, on the basis of the discussion with the Advisory Committee, the Merger Task Force will draw up a proposal for a final decision for the Commission.[207]

The Commission has four months to conclude its investigation and announce its decision.[208] If it has not issued a decision by this time, subject to Article 9,[209] the

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199. Merger Regulation, *supra* note 107, at 13, art. 7; *see also* WYATT & DASHWOOD, *supra* note 21, at 517 (relating the Commission's power to extend the Article 7 suspension period for the entire duration of its investigation into the compatibility of the merger).

200. *See* Broberg, *supra* note 179, at 20 (stating that in cases of true mergers the notification must be made jointly by the parties involved, and in all other cases, the notification duty lies with the party acquiring control); *see also* Merger Regulation, *supra* note 107, at 13, art. 4 (stating the requirements for notification). The one week begins when the first of those events occurs. *Id.*

201. Broberg, *supra* note 179, at 21.

202. Merger Regulation, *supra* note 107, at 13, art. 6; *see also* Broberg, *supra* note 179, at 21 (discussing the fact that the majority of notified cases only reach the first phase and end with a so-called "6(1)(b) decision," clearing the merger).

203. *See* Broberg, *supra* note 179, at 21 (relating the difference in investigation time between the first-phase and second-phase investigations). The second-phase investigation consumes a longer time period to enable the Commission to go into an in-depth analysis of the concentration and its consequences. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 21-22.

207. *Id.* at 22.

208. *See* Elland, *supra* note 100, at 114 (relating Article 10(3) states there is a four week requirement for Commission decisions subject to certain exceptions).

209. Merger Regulation, *supra* note 107, at 13, art. 9 (Article 9 provides the criteria for the referral of a merger investigation to the competent authorities of the Member States).

merger will be deemed compatible with the Common Market.[210] The Commission estimates it will take a total of five months from notification to a ruling on the compatibility of a merger when a full investigation takes place.[211]

C. Substantive Appraisal of Mergers Using Article 2

The purpose of requiring notification of qualifying mergers is to enable the Commission to establish whether the mergers are compatible with the common market.[212] According to Article 2(2) of the Merger Regulation, "A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market."[213] On the other hand, a concentration without such effects must be held incompatible with the common market.[214]

Article 2 of the Merger Regulation refers to "dominance" which creates a significant impediment to effective competition.[215] Before market dominance can be analyzed, the Commission must determine what constitutes the "relevant market."[216] Relevant market refers to the market in which the operation will have its impact and consists of two components: (1) relevant product market; and (2) relevant geographical market.[217] The Commission uses two criteria to determine relevant product market.[218] First, whether there is a sufficient degree of substitutability between the products in question.[219] Second, if the products are totally

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210. *See* Merger Regulation, *supra* note 107, at 13, art. 9(4)(b)(6) (stating "If within the three months . . . the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral . . . nor has taken preparatory steps . . ., it shall be deemed to have taken a decision to refer the case to the Member State concerned").

211. *See* Elland, *supra* note 100, at 114 (explaining five months for a full investigation is an estimate, but very rarely will the Commission be allowed more time to make a decision).

212. *See supra* notes 197-211 and accompanying text (explaining the purpose for requiring merging corporations to notify the Commission in regards to their intent to consolidate operations).

213. Merger Regulation, *supra* note 107, at 13, art. 2(2).

214. *See* WYATT & DASHWOOD, *supra* note 21, at 503 (explaining Article 2 is neutral as to compatibility, therefore, the Commission must determine compatibility on a case by case basis during a single stage inquiry).

215. *See id.* at 504-05 (suggesting the dominance criteria is a device allowing the Commission to depart from a mechanistic approach to dominance and to take into account other matters in measuring dominance).

216. *See id.* (relating that before the existence of dominance can be established, the Merger Regulation requires an analysis of the relevant market).

217. *See* Picat & Zachmann, *supra* note 178, at 242 (stating relevant market is the market in which the merger will have its impact). The relevant market is determined by defining the relevant product market and the geographical market. *Id.* Relevant market is based on substitutability of product in a genuine competitive situation and geographic market refers to a territory with substantially equal conditions to allow for an assessment of the merger. *Id.*

218. *See id.* (explaining relevant product market requires at least short term competition between products in order for the products to be considered in the same product market).

219. *Id.*

interchangeable, whether there exists different competition conditions.[220] The relevant geographical market is defined by the Commission as "the territory in which the corporations concerned are involved in the sale and demand for goods and services, in which competition conditions are sufficiently homogeneous and where the territory may be separated from neighboring zones because competition conditions are considerably different."[221] Former Competition Commissioner Sir Leon Britain has forcefully rejected the first possibility of merely a Community-wide market by claiming "[o]ur only concern is for competition within the Community and I reject the argument that a competitive world market may justify a dominant position in the Community . . . There can be no trade-off between competition in the Community and competitiveness elsewhere. This would be economic nonsense and bad law"[222] Therefore, the provision in Article 2 stating "all markets concerned" makes it clear the competitiveness of Community industries in the context of international competition will be an important factor in determining whether or not a merger will be allowed.[223] Clearly the council had in mind the ability of Community industry to compete with the American and Japanese multinational corporations.[224]

Once the relevant market is identified, the Commission evaluates the fundamental question: is the proposed merger likely to strengthen or create a dominant position?[225] Using the criterion set forth in Article 2, the Commission examines whether the proposed merger creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it.[226] In determining whether a merger is or is not compatible, "the Commission shall take into account [the] need to preserve and develop effective competition within the common market"[227] by evaluating the structure of the markets and the impact of competition from within the Community as well as outside the Community.[228] Article 2(1)(b) sets out the factors that the

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220. *Id.*

221. *See* WYATT & DASHWOOD, *supra* note 21, at 505-06 (stating there is debate as to whether the relevant geographical market should be limited to only Community-wide or whether Article 2(1)(a) of the Merger Regulation includes "competition from mergers located within or outside the Community").

222. WYATT & DASHWOOD, *supra* note 21, at 506; *see id.* at 506-07 (explaining for competition and political reasons, it is impossible to ignore the global implications of the Merger Regulation's scope for mergers falling within its control).

223. *See* Elland, *supra* note 100, at 116 (relating the Commission's statement to the Council in reference to the Article 2 clause was that it encompassed markets both within and outside the Community).

224. *Id.*

225. *See* Picat & Zachmann, *supra* note 178, at 243 (relating the traditional standard of evaluation is whether one of the merging corporations is able to perform its business independent from its competition or customers).

226. *See id.* (explaining the real threat to competition only comes from a dominant position likely to continue for the long term).

227. Merger Regulation, *supra* note 107, at 13, art. 2(1)(a).

228. *See* David Banks, *Non-Competition Factors and their Future Relevance under European Merger Law*, 3 EUR. COMPETITION L. REV. 182 (1997) (stating before the Commission considers competition within and outside the EC, it must first take into account the need to preserve and develop effective competition).

Commission is to take into account in assessing whether a merger may have an adverse effect on competition.[229] These factors include: the market position of the undertakings concerned; their economic and financial power; the alternatives available to suppliers and users; their access to supplies and markets; any legal or other barriers to entry; supply and demand trends for the relevant goods and services; the interests of the intermediate and ultimate consumers; and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[230]

The Commission's role is to evaluate the future strength of the merged corporations, and their impact on the competition structure of the market in question.[231] In so doing, the Commission analyzes the market positions of the businesses concerned in comparison with the competitive strength of other current and potential competitors in the market.[232] Generally, significant market share is an important indication of dominant position, but it does not necessarily lead to a finding of dominant position.[233] The Merger Regulation does not prohibit any and all dominant positions, rather it stipulates that a dominant position only exists if "as a result . . . effective competition would be significantly restricted in the common market."[234] Therefore, only a dominant market position likely to continue for the long-term poses any legitimate threat to the market's competition structure.[235]

D. Exceptions to the Commission's Application of the Merger Regulation

In order to gain approval of the Merger Regulation, the Commission had to give certain concessions to Member States who were hesitant to give of domestic control of regulating mergers.[236] Article 9 of the Merger Regulation is known as the "German clause."[237] In the event the Commission decides the Merger Regulation

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229. *Id.*

230. Merger Regulation, *supra* note 107, at 13, art. 2(1)(a).

231. *See* Picat & Zachmann, *supra* note 178, at 243 (explaining the Commission, in evaluating future strength, must take into account various factors and perform a structural and prospective analysis).

232. *See id.* (relating in analyzing the market position of the merging corporations, if the companies have large market shares, entry barriers become significant in determining whether the firms have the power to distort competition in the market).

233. *See id.* (explaining when a large market share exists, it is possible for the Commission to consider potential pressure coming into the geographical market and pressure from other products on the product market).

234. Merger Regulation, *supra* note 107, at 13, art. 2(4).

235. *See* Picat & Zachmann, *supra* note 178, at 243 (discussing Article 2(4) and its impact evaluating a dominant position). Article 2(4) does not prohibit any and all dominant positions, only those significantly restricting competition. *Id.*

236. *See* Elland, *supra* note 100, at 116 (stating that one of the prime objectives of the Commission and many Member States was that the Merger Regulation would provide one-stop control). Thus, only Brussels would have competence to deal with Community-wide mergers, whilst the Member States would remain competent to deal with smaller mergers. *Id.* Unfortunately, this scheme had to give way to satisfy national sensibilities, in particular those of Germany. *Id.*

237. *See* WYATT & DASHWOOD, *supra* note 21, at 510 (referring to Article 9 as the so-called German clause).

does not provide an adequate solution to a merger problem, the German clause allows for the possibility of a "referral to the competent authorities of a Member State" where a concentration threatens to create or strengthen a dominant position which would significantly impede effective competition in a market within a Member State.[238] Therefore, it is possible for any Member State to make a claim for jurisdiction on a merger with a Community dimension if the merger affects competition in a separate and distinct market within that country.[239] In all circumstances, the Commission retains power to approve such a referral.[240]

The second exception to the Merger Regulation addresses three sectors: public security, plurality of the media, and prudential rules.[241] According the Article 21, Member States may call for "appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation."[242] However, Member States may not authorize a merger prohibited by the Commission.[243]

Finally, there is an exception operating in favor of the Commission exercising its authority over corporate mergers.[244] The "Dutch Clause" allows a Member State to request the Commission to investigate a merger even though it does not meet the thresholds for the application of the Merger Regulation.[245] This "reverse" exception was favored by the smaller Member States which were in favor of giving up merger control to the Commission since they were lacking in domestic merger controls.[246]

VI. WAS THE MERGER REGULATION APPLIED CONSISTENT WITH THE STATED CRITERIA AND THE GOALS OF EC COMPETITION LAW IN THE BOEING/MCDONNELL DOUGLAS MERGER?

Although stating the contrary, the European Commission has evaluated many multinational mergers on factors and policy different from what is stated in the EC

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238. Merger Regulation, *supra* note 107, at 13, arts. 9(2) & 9(3).

239. *See* Ridyard, *supra* note 111, at 248 (stating the German clause allows an individual country to determine compatibility of a merger, if the merger has significant impact within that country).

240. *See* Picat & Zachmann, *supra* note 178, at 254 (relating that Article 9(3) of the Merger Regulation grants the Commission exclusive power to decide whether to refer a merger to a Member State's authorities).

241. *See id.* (labeling the Article 23 exception the 'legitimate interests' clause and stating since the adoption of the Merger Regulation it has not been used).

242. Merger Regulation, *supra* note 107, at 13, art. 21(3).

243. *Id.* at 13, art. 21(2) (No Member State shall apply its national legislation on competition to any consideration that has Community dimension).

244. *See* Picat & Zachmann, *supra* note 178, at 254 (stating the Dutch clause was a response to the fact that some Member States do not have merger control at a national level). These Member States include Portugal, Greece, the Netherlands and Luxembourg. *Id.*

245. Merger Regulation, *supra* note 107, at 13, art. 22(3) "If the Commission finds, at the request of a Member State, that a concentration . . . has no Community dimension . . . [but] creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned, it may" apply the EC Merger Regulation. *Id.*

246. *See* Ridyard, *supra* note 111, at 248 (relating the Dutch clause was favored by the smaller Member States who were eager to turn over control of mergers to the European body).

Treaty and the Merger Regulation.[247] Since the European Commission has the duties of making and enforcing laws,[248] it is important to determine whether there is a clash between the EC's goals and the means to attain those goals.

In November of 1995, Boeing began evaluating the potential of a merger with McDonnell Douglas.[249] Such a merger would do away with old assumptions about what is needed to maintain both U.S. defense and industrial might, namely intra-national competition.[250] In search of greater efficiencies mandated by rapidly changing global markets, Boeing believed a merger with McDonnell Douglas would create the best opportunity for synergy and cost savings, thus enhancing Boeing's global competitiveness.[251] The ability to be competitive is by far the most crucial corporate characteristic for the long-term survival of any corporation in today's global markets.[252] The U.S. government has encouraged the merger saying such combinations achieve needed cost savings due to the dwindling post-Cold War spending.[253]

Boeing, faced with a record number of commercial aircraft orders, needed qualified personnel to help meet the surging demand.[254] McDonnell Douglas, on the other hand, missed out on the explosion in aircraft orders that has inundated Boeing

247. *See* Davies & Lavoie, *supra* note 155, at 28 (stating that EU Competition Commissioner Karel Van Miert said in his first speech that it is no longer acceptable to judge mergers by competition criteria alone). Competition policy "cannot be applied without reference to the . . . political . . . context." *Id. But see Merger Control: Commission Resisting "Political Pressures" on Boeing/MDD Case*, EUR. RPT., July 19, 1997, § 2242 (stating that EU Competition Commissioner Karel Van Miert said that the merger was considered "strictly within the terms of the EU Merger Regulation on the basis of concrete facts and figures" and that there were no political motivations).

248. *See supra* notes 118-57 and accompanying text (explaining the role and powers of the European Commission).

249. *USA: Boeing and McDonnell Douglas in Merger Talks*, REUTER TEXTLINE AGENCE EUR., Nov. 18, 1995.

250. *See* Jeff Cole, *Big Combinations Lie Ahead for Aerospace Businesses—Boeing-McDonnell Douglas Discussions Signal a Change in Thinking*, WALL ST. J., Nov. 20, 1995, at B4 (quoting Mr. Ufirer of the Bear Stearns investment banking firm as stating that when such fierce arch rivals merely talk about combining, "it's a real visible sign that everyone's old thinking has changed or will change").

251. *See id.* (quoting a supplier to both corporations as saying, "[The merger] would create a much more competitive company").

252. *See id.* (stating while the "new" Boeing and Airbus hold down most of the commercial aircraft market today, companies in China, Russia, Japan and elsewhere are pressing hard and successfully to receive U.S. and European technology transfers that will nurture their own commercial aircraft operations).

253. *See* Paul Sloan, *McDonnell Douglas, Boeing Hint at Merger*, THE COMM. APPEAL-MEMPHIS, TENNESSEE, Nov. 17, 1995, at B5 (stating the merger creates a company with US$35 billion in annual sales with a strong presence in civil aircraft, fighter jets, military cargo planes, rocket launchers and space business).

254. *See Boeing Signs McDonnell to Help With New Big Jets*, THE COMM. APPEAL- MEMPHIS, TENNESSEE, Dec. 4, 1996, at B8 (stating that Boeing had orders for 618 aircraft valued at US$46 billion in 1996 which was the highest order amount since Boeing started building commercial aircraft in 1955). This flood of orders, along with other development projects such as a larger 747's, had Boeing scrambling to hire engineers and production workers away from rivals around the world. *Id.* McDonnell Douglas will give Boeing an immediate pool of talent. *Id.*

and rival Airbus,[255] partly because airlines prefer manufacturers with a full-family of varying sized aircraft.[256] Ultimately, the merger makes perfect sense because it will save a company struggling to compete, and help a company struggling to keep up with demand, thus securing thousands of U.S. jobs.[257]

On July 1, 1997, the United States Federal Trade Commission approved the Boeing and McDonnell Douglas merger without any conditions.[258] On July 30, 1997, the European Commission approved the merger of the two U.S. corporations, however, the merger was approved only after Boeing offered concessions in answering the Commission's identified competition objections.[259] In understanding the Commission's approach, it must be remembered that the aircraft manufacturing business has come a long way since the Wright Brothers took flight in 1903.[260] Today, building planes has become very political because commercial aircraft contracts can total billions of dollars, and they do not occur frequent enough to shrug off losing a contract.[261]

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255. *See* Christopher Noble, *Airbus Partners Agree to Restructuring*, THE REUTER EUR. COMMUNITY RPT., Jan. 3, 1997 (explaining Airbus is a French legal entity whose profits go to the four partners who make decisions by consensus). These four partners are French owned Ste Nationale Industrielle Aerospatiale, British Aerospace Plc, Daimler-Benz Aerospace and Construcciones Aeronauticas of Spain. *Id.*

256. *See Boeing Signs McDonnell, supra* note 254, at B8 (relating that Boeing and Airbus have a full family of different-sized aircraft, while most of McDonnell Douglas' jetliners are smaller models). Airlines prefer to contract with one manufacturer because this keeps the cost of supplies to a minimum. *Id.*

257. *See USA: Boeing and McDonnell Douglas, supra* note 249 (stating that Boeing had approximately 105,000 employees and McDonnell Douglas has approximately 65,760 employees in 1995).

258. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 17 (relating the date of the FTC approval and stating the concerns of the U.S. Department of Defense and Department of Justice). The concerns included: (1) a Commission decision invalidating the merger would harm vital U.S. defense interests; (2) keeping McDonnell Douglas as a stand alone manufacturer would result in an inefficient divestiture of McDonnell Douglas' manufacturing operations which would cause a loss in jobs; and (3) a third party owner of McDonnell Douglas would only operate the company as a supplier of parts for existing aircraft with the incentive and means to raise prices and diminish service. *Id. But see Merger Control: Boeing Merger Approval Points Up Lessons for Regulators and Industry*, EUR. RPT., July 26, 1997, at § 2244 (quoting Boeing CEO Phil Condit as saying deference should be paid to the FTC which has prime jurisdiction over the merger). *But see,* Amelia Torres, *Commission Reasserts Right to Vet Boeing/McDonnell Merger*, REUTER EUR. COMMUNITY RPT., May 15, 1997 (stating that under the "positive comity principle" the better placed authority, here the FTC, investigates any anticompetitive practices and whatever the FTC decides should be acceptable for the European Commission).

259. Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16); *see also, The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, Commission of the European Communities, July 30, 1997, at Press Release; IP: 97/729 (stating the Commission approved the merger of Boeing/McDonnell Douglas after intense negotiations led Boeing to offer commitments to resolve the Commissions objections over competition).

260. *See EU Cool on Boeing, McDonnell-Douglas Merger*, EUROWATCH, May 30, 1997, Mergers; Vol. 9, No. 7 (relating politics was in aircraft manufacturing when governments either displayed or covered up their latest military addition, or when politicians spoke of the latest jet liner developed in their country); *see also Technology Keeps U.S. Aerospace Industry in Front*, PR NEWSWIRE, Dec. 17, 1997 (relating the date of the first flight by the Wright Brothers in the Kitty Hawk was December 17, 1903).

261. *See EU Cool on Boeing, McDonnell-Douglas Merger, supra* note 260 (explaining that even the biggest aircraft manufacturers can be brought to the edge of insolvency if they lose a contract). This is evident in McDonnell Douglas changing its focus from commercial to defense aircraft, and in Airbus which was financially

In the Boeing/McDonnell Douglas merger, the Commission's concern was the strengthening of Boeing's dominant market position.[262] The Commission considered Boeing's dominant position as strengthened by three situations. First, Boeing's overall market share would increase from 64% to 70%, their customer base would increase from 60% to 84% of the current world-wide fleet in service, and Boeing would be the only manufacturer with a complete family of aircraft.[263] Additionally, Boeing's position could not be challenged by new entrants into the market due to the high barriers to entry in this capital intensive aircraft manufacturing market.[264]

Second, the Commission claimed Boeing's dominant position was demonstrated by Boeing's long term supply deals with some of the U.S.'s leading commercial airlines.[265] The Commission felt that these twenty year agreements would create a barrier to competition for the only other competitor, the European consortium of Airbus.[266]

Finally, the Commission was concerned about the acquisition of McDonnell Douglas' defense and space activities because this would enhance Boeing's access to publicly funded research and development, and intellectual property as well as increase Boeing's bargaining power with suppliers.[267]

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supported many times by the consortium of European countries that formed it. *Id.*; *see also id.* (discussing that both sides of the Atlantic charge the other with impropriety). Both have accused the other of linking aircraft purchases to granting financial aid and access to markets for third-party countries. *Id.*

262. *See The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, *supra* note 259 (explaining that after the thorough Commission investigation, the Commission determined Boeing already had a dominant market position, and that position would only rise with the acquisition of McDonnell Douglas); *see also* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 25 (stating Boeing's dominant position would be strengthened through the addition of McDonnell Douglas' competitive potential in large commercial aircraft and the increase in Boeing's resources due to the spill over effect from McDonnell Douglas' position in the defense and space industries). *But see* Sarah Turnbull, *Barriers to Entry, Article 86 EC and the Abuse of a Dominant Position: An Economic Critique of European Community Competition Law*, 2 EUR. COMPETITION L. REV. 96, 102 (1996) (claiming the Commission has stated, "Being big is not a sin").

263. *See The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, *supra* note 259 (pointing to three factors the Commission used to conclude Boeing has a dominant position). These factors include market share, type of aircraft offered and the size of the Boeing fleet in service. *Id.*

264. *See id.* (explaining that the cost to enter the aircraft manufacturing industry prohibits others from entering the market and stabilizing the effect of Boeing's dominant position).

265. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 23 (relating the exclusive deals were with American Airlines, Delta Airlines and Continental Airlines). These deals are believed to have significant impact on the global market for large jet aircraft because the agreements tie up 13% of the open market for the next 20 years. *Id.*

266. *See BOEING v. AIRBUS, Peace in Our Time*, THE ECONOMIST, July 26, 1997, at 59, 61 (explaining the Commission believed these exclusive agreements would cut off Boeing's only competition, the European consortium Airbus, from access to a portion of the U.S. market).

267. *See The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, *supra* note 259 (stating the increase in Boeing's defense related research and development would increase the their know-how and increase their technological capabilities). The combination of military, civil and space activities would allow Boeing to leverage suppliers at the cost of competitors. *Id.*; *see also*, Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 35 (claiming the combination of the two corporations would lead to a significant increase in Boeing's buying power vis-a-vis its suppliers because

In response, Boeing offered a number of concessions, three of which addressed each of the Commission's objections. First, as far as exclusive deals are concerned, Boeing agreed not to enforce the exclusive agreements with airlines and will not enter any such agreements until 2007.[268] Second, while the Commission felt that the merger would strengthen Boeing's dominant position, the Commission's investigations revealed there were no existing aircraft manufacturers interested in buying McDonnell Douglas.[269] In view of these objections, Boeing committed itself to maintain the companies as separate entities for ten years, and to report to the Commission the results of McDonnell Douglas' performance.[270] Additionally, Boeing limited the effect of McDonnell Douglas' existing fleet by not linking the sale of Boeing aircraft to their access to the McDonnell Douglas fleet in service.[271] In relation to the overall effects of the deal, Boeing offered to concede to competitors non-exclusive licenses for patents, together with the underlying know-how, held by Boeing arising from publicly funded research and development.[272] Furthermore, Boeing agreed to provide an annual report on "non-classified" projects that benefit from public financing.[273] This package of remedies addressed all of the Commission's concerns, and ultimately convinced the Commission to approve the merger.

Viewing this merger in light of the Merger Regulation and the goals of the EC's competition laws, the Commission appears to have been consistent. The first

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approximately 50% of a manufacturer's activities are related to third party supplies). This increase in buying power could hurt the competitive position of Airbus. *Id.* The Commission infers Boeing pressured Northrop Grumman to drop a partnership with Airbus because of Boeing's market position rather than Northrop's business decision not to take the risk of working with Airbus in developing an aircraft. *Id.*

268. *See Merger Control: Boeing Merger Approval Points Up Lessons for Regulators and Industry*, EURO. RPT., July 26, 1997 (explaining Boeing gave up the exclusive contracts with airlines). However, if other aircraft manufacturers, such as Airbus, strike a sole-supply deal with a customer in the future, then Boeing is free to do so. *Id.*; *see also* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 37 (defining exclusive agreement as a contract not to purchase or lease aircraft from another manufacturer or a contract to purchase a specified number of aircraft from one manufacturer).

269. *See The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, *supra* note 259 (stating the Commission discovered there was no aircraft manufacturer interested in McDonnell Douglas and it was not possible to find another market entrant who could achieve entry by acquiring McDonnell Douglas).

270. *See id.* (relating the reports are to be publicly available and prepared by an independent auditor). *But see* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 28 (relating the interesting fact that Airbus, being a 'special' French legal entity, is not required and does not publish its own financial accounts). Therefore, a detailed financial comparison between Airbus and Boeing is impossible. *Id.*

271. *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Conditions and Obligations*, *supra* note 259.

272. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 38 (detailing the contents of the R&D reports). The reports are basically intended to provide the EC (Airbus) with the details of any research and development project involving U.S. government aeronautics and Boeing. *Id.* The reports include, inter alia, a description of the project sufficient to enable the EC an understanding of the nature of the R&D being performed, a description of the new ideas resulting from the R&D that are being placed in large commercial aircraft and a description of Boeing's patents obtained that year. *Id.*

273. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 37 (defining the government-funded patent as a patent claiming an invention resulting from a government contract).

objective of EC competition law,[274] the prevention of trade barriers and monopolies, is clearly active here. Boeing's exclusive agreements with other carriers would certainly create a barrier to market entry.[275] Additionally, the Commission claims there are subsidies that are also contrary to the first objective.[276] The second objective,[277] the maintenance of effective competition, at first glance is satisfied since the strengthening of Boeing's market share from 64% to 70%[278] would restrict competition. However, upon analyzing the competitive market that forced the merger, it is apparent that the market had already determined that two manufacturers could supply the world's commercial jetliners.[279] Therefore, the second objective does not seem to be sustained in this situation. The third objective, consumer protection, is applicable to this situation because in Europe this merger is seen as a direct threat to Airbus, the source of national pride, technological innovation and most importantly, well paying jobs.[280]

Were the Commission's actions consistent with the Merger Regulation's criteria? First, the merger must have a Community dimension.[281] There is no doubt that the merger qualifies as meeting the minimum world-wide and Community-wide thresholds.[282] However, there is great debate surrounding the Commission's exercise

274. *See supra* notes 46-48 and accompanying text (relating the three objectives the Commission identified in the *First Report on Competition Policy*).

275. *See Merger Control: Commission Sends Statement of Objections to Boeing/MDD Merger*, EUR. RPT., May 24, 1997 at 2 (stating that the exclusive agreements could tie up 30% to 40% of the new aircraft market for 20-25 years).

276. *See* Andrea Rothman & Raphael Minder, *EU Official Complains of U.S. Jet-Maker Subsidies—Concerns Could Complicate Review of Boeing Deal*, THE SEATTLE TIMES, Apr. 28, 1997 (discussing EC official's claims that the subsidy level to U.S. aircraft makers is too high). They claim the U.S. is violating the 1992 agreement which limited state subsidies to 33%.). *Id. But see id.* (quoting Paul Nisbet; aerospace analyst, as saying, "the very substantial subsidies over the years that have gone to Airbus are at least as equal and probably exceed those that have gone to Boeing). Mike Korens stated "Airbus has been heavily subsidized by four consortium states for years, so people in glass houses shouldn't throw stones." *Id.*

277. *See supra* notes 46-48 and accompanying text (relating the three objectives the Commission identified in the *First Report on Competition Policy*).

278. *EU/Competition—The Objections Over Boeing Merger*, REUTER TEXTLINE AGENCE EUR., May 24, 1997.

279. *See* Stanley Holmes, *Condit Rejects EU Merger Concerns—Boeing Chief: Deal Won't Restrict Competition*, THE SEATTLE TIMES, May 22, 1997, at Business E1 (explaining that prior to the merger, McDonnell Douglas' market share for commercial planes had fallen to 4% of new sales. Most of Airbus' 35% of market share came at the expense of McDonnell Douglas.)

280. *See* Alex Fryer, *Jobs, Pride are Behind Europe's Boeing Jitters—Politicians Believe Jobs, Technology at Stake*, THE SEATTLE TIMES, July 18, 1997, at Business E1 (relating that political pressure at home may push the Commission to place restrictions of the Boeing / McDonnell Douglas merger). This pressure resulting from political pressure has this merger far beyond a simple business transaction. *Id.*

281. *See supra* notes 185-96 and accompanying text (relating the three objectives the Commission identified in the *First Report on Competition Policy*).

282. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 17 (stating the operation constitutes a concentration within the meaning of the Merger Regulation). Additionally, the Commission states the Community dimension requirement is satisfied since the concentration surpasses the minimum thresholds and the merging corporations do not have more than two-thirds of their Community-wide turnover in one Member State. *Id.; see also supra* note 249 (explaining Boeing had world-wide turnover of US$21.92 billion in 1994 and McDonnell Douglas had world-wide turnover of US$13.17 billion in 1994); *see also*

of jurisdiction over the Boeing merger as a result of the "positive comity principle."[283] The positive comity principle is an informal agreement between the U.S. and the EC over merger scrutiny in which a merger is investigated by the better placed authority, usually the one where the principle place of business is located.[284] For example, if two large U.S. companies merge, the Federal Trade Commission would normally rule first and the European Commission would follow that lead.[285] If the positive comity principle is followed, as it usually is, the EC should be without jurisdiction.

Next in the application of the Merger Regulation is the determination of "dominant position" using the criteria of Article 2. First, the Commission determines the relevant market, and in so doing, considers the competitiveness of EC industries in the context of international competition.[286] In the Boeing merger, the Commission rightfully considered the impact on the competitiveness of Airbus in the commercial aircraft business since the merger would leave only two commercial aircraft manufacturers in the world economy.[287] With only two manufacturers in the world, the relevant market to be considered in this merger must be global.[288]

As discussed earlier, a concentration that does not create or strengthen a dominant position that would impair effective competition in the EC shall be declared compatible with the common market.[289] Using the factors in Article 2(1)(b) the Commission is to evaluate the dominant position of the new Boeing. The first factor to consider is the market position of the merging companies.[290] As previously discussed, the market position of a combined Boeing and McDonnell Douglas is

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Boeing Files McDonnell Deal for EU Approval, THE REUTER EUR. COMM. RPT., Feb. 20, 1997; *see also supra* note 275 (stating that Boeing CEO Phil Condit took the EC's jurisdiction seriously as evidenced by his filing with the Commission on February 18, 1997).

283. *See* Torres, *supra* note 258 (stating the European competition director rejected Boeing's view that the Commission should allow the U.S. authorities to investigate and accept their conclusion). The Commission said the positive comity principle does not apply to the investigation of mergers. *Id.* They argue this principle only applies when a company is having problems selling goods in another country. *Id.*

284. *Id.*

285. *See Van Miert in the Air*, THE ECONOMIST, May 24, 1997, 16 (explaining there has long been an agreement between the U.S. and the EC over merger scrutiny). Here, Van Miert has done away with such agreement and listed objections to the merger even before the United States Federal Trade Commission has ruled on the deal. *Id.*

286. *See* Elland, *supra* note 100, at 116 (explaining this approach was implemented to give the EC the ability to compete with the large, multinational corporations of the U.S. and Japan).

287. *See BOEING v. AIRBUS: Peace in Our Time*, *supra* note 266, at 59 (displaying a graph showing the market share of the world's aircraft manufacturers). This article also states that Boeing's market share of existing aircraft is now up to 70% and Airbus' market share is at 30%. *Id.* at 61.

288. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 17 (explaining the market is the world market for large commercial aircraft since the EC is an important part of the world market and the EC market's competitive structure is similar to the global market).

289. Merger Regulation, *supra* note 107, at 1, art. 2(2).

290. *Id.*

approximately 70%.[291] The second factor, the economic and financial power of the merging companies, is huge in this merger since the new Boeing's size allows it to gain favorable supply contracts in both the commercial and defense aircraft industries.[292] The third factor, alternatives available to suppliers and users, is not significant since the merger only slightly changes the market composition.[293] It is true there is one less manufacturer, however, that manufacturer could not survive in the competitive global market. The market had spoken and determined McDonnell Douglas would no longer be a participant.[294] The next factor to consider is the merging companies' access to supplies and markets.[295] At present, Boeing's disproportionate share of the market allows it greater access to supplies and markets. This, however, is changing as Airbus expands the type of planes offered and gains more orders.[296] Therefore, access to the market appears to be equaling out as Airbus expands and becomes more profitable.[297] Factor number five looks at

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291. *See BOEING v. AIRBUS: Peace in our time*, *supra* note 266 (displaying a graph showing the market share of the world's aircraft manufacturers). This article also states that Boeing's market share of existing aircraft is now up to 70% and Airbus' market share is at 30%. *Id.* at 61.

292. *See Merger Control: Commission Resisting "Political Pressures" on Boeing/MDD Case*, EURO. RPT., July 19, 1997 (discussing the Commission's objection to Boeing's potential leverage on purchasers of McDonnell Douglas aircraft through parts and maintenance contracts); *see also See BOEING v. AIRBUS: Peace in our time*, *supra* note 266, at 59 (explaining the impact of exclusive contracts on the remaining competitors). *But see* Stanley Holmes, *Condit Rejects EU Merger Concerns—Boeing Chief: Deal Won't Restrict Competition*, THE SEATTLE TIMES, May 22, 1997, at Business E1 (quoting Condit's response to the exclusive deals, "American and Delta approached Boeing for the exclusive-supplier contracts after an aggressive sales campaign between Boeing and Airbus").

293. *See BOEING v. AIRBUS: Peace in our time*, *supra* note 266 (displaying a graph showing the market share of the world's aircraft manufacturers).

294. *See* Stanley Holmes, *Condit Rejects EU Merger Concerns—Boeing Chief: Deal Won't Restrict Competition*, THE SEATTLE TIMES, May 22, 1997, at Business E1 (relating the Boeing CEO's belief that the merger does not restrict competition since the market has determined there will be only two manufacturers of commercial aircraft). Before the merger was announced, McDonnell Douglass' market share had shrunk to 4% of new sales. *Id. But see* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 25 (claiming a study financed by Airbus concluded McDonnell Douglas' participation in competing for aircraft supply contract led to a 7% reduction in the final price).

295. Merger Regulation, *supra* note 107, at 1, art. 2(1)(b).

296. *See BOEING v. AIRBUS: Peace in our time*, *supra* note 266, at 60 (showing a chart that displays Airbus' rising number of aircraft orders as it increases the number of different types of aircraft offered); *see also EU/Competition—The Objections Over Boeing Merger*, REUTER TEXTLINE AGENCE EUR., May 24, 1997 (stating that the world-wide market orders of commercial aircraft at the end of 1996 were Boeing 64%, Airbus 30%, McDonnell Douglas 6%, and in Europe the market orders were Airbus 37%, Boeing 31%, and McDonnell Douglas 2%); THE SACRAMENTO BEE, Nov. 4, 1997, Business; p.1 (stating that Boeing will drop two types of McDonnell Douglas aircraft, the MD-80 and MD-90, because Boeing's 737 has taken market share from these two MD planes). However, Boeing will keep alive the MD-11 jumbo jet and the 100 seat MD-95. *Id.*

297. *See BOEING v. AIRBUS: Peace in our time*, *supra* note 266, at 59-60 (stating that Airbus once required governmental subsidies to remain "afloat," but today, Airbus has sales of approximately US$9 billion and profits of about US$1 billion a year). Airbus has been valued at between US $15 to US$20 billion. *Id.*; *see also* THE SACRAMENTO BEE, Nov. 4, 1997, at Business; p.1 (stating that Airbus had just confirmed an order with U.S. Airways Group for 124 planes worth approximately US$6.2 billion). This contract places Airbus "neck and neck" with Boeing in new aircraft orders in 1997. *Id.*; *but see* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 21 (claiming Airbus was not able to significantly improve its

barriers to entry.[298] Certainly the most formidable barrier to entry into the aircraft manufacturing market is the monetary outlay that is required to develop a marketable aircraft.[299] Next to consider is the factor of supply and demand trends for the aircraft manufacturing industry.[300] Over the next ten years, trade forecasters predict that commercial airlines are likely to purchase up to 2,500 new jet aircraft in the U.S. and approximately 2,100 in Europe and 1,800 in the Asia-Pacific region.[301] European officials claim these figures prove how important it is for the Commission to consider this merger.[302] "Consumer interests" is the seventh factor to be considered under Article 2.[303] In theory, this merger could have a negative impact on the traveler. Although less than 10% of the cost of a ticket on an airline goes to the cost of the aircraft, Europeans are concerned that the "monopoly supplier" would soon force airlines to raise their prices.[304] The final factor, the development of technical and economic progress, is more of a European specific criteria and probably does not apply in this merger.

The Commission's regulation of the Boeing/McDonnell Douglas merger appears consistent with the goals of the EC and criteria for the application of the Merger Regulation. However, there is still the belief that the criteria in the Merger Regulation gives the Commission too much power to create competition legislation to satisfy European needs and then to review a broad range of transactions having cross-boarder impact.[305] Even Europeans share this view. Days after the merger was

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position during the 1990s and it is difficult for Airbus to attack Boeing's market position).

298. Merger Regulation, *supra* note 107, at 1, art. 2(1)(b).

299. *See* Commission Decision, Case No IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L336/16) 24 (relating Boeing's estimate of US$10 billion to develop a new wide body jet). Additionally, there is a significant learning curve and there is a need to achieve economies of scale before a company would be competitive. *Id.* Any potential entrant will likely only compete on a regional level and not in the global large commercial jet market. *Id.*; *see also Commission Clears the Merger Between Boeing and McDonnell Douglas under Conditions and Obligations*, COMMISSION OF THE EUROPEAN COMMUNITIES, July 30, 1997 (explaining that the large amount of capital required to enter the aircraft manufacturing industry creates a high barrier to entry and therefore makes it almost impossible for any competition to enter the market).

300. Council Regulation 4064/89 on the Control of Concentration Between Undertakings, 1989 O.J. (L395)1, art. 2(1)(b).

301. *Merger Control: Commission Sends Statement of Objections to Boeing/MDD Merger*, EUR. RPT., May 24, 1997.

302. *See id.* (stating these figures illustrate the importance in ensuring the 'new' Boeing is not in a position to eliminate competition in the EC).

303. Council Regulation 4064/89 on the Control of Concentration Between Undertakings, 1989 O.J. (L395)1, art. 2(1)(b).

304. *See Van Miert in the Air*, THE ECONOMIST, May 24, 1997, at 18 (explaining in theory the merger could have a large impact on travelers). Even though a small portion of the cost of a ticket goes toward aircraft ownership expenses, more expensive aircraft would most likely raise prices for consumers. *Id.*

305. *See* Mark S. Porter, *M&A Global Activity May Prompt Regional Trade Alliances*, MERGERS & ACQUISITIONS RPT., Aug. 11, 1997, at p.16 (stating that the Commission has massive legislative power that it intends to wield on behalf of its member states and their companies). A Solomon Bros. Report states, "The Merger Regulation vests the Commission with the authority to review and to potentially interrupt transactions it feels may have an unfair competitive impact on members of the EU." *Id.* This implies that deals with U.S. firms could be ruled anti-competitive by the EC if they improve goods or services to the detriment of European competitors. *Id.*

announced, some Commission officials and antitrust lawyers claimed the Commission's attack on the Boeing merger reflected a "political desire" to protect the European consortium Airbus.[306] A Brussels based attorney stated, "I find it hard to believe that the EC is a neutral party. It has an interest in promoting the European industry, in promoting Airbus."[307] It appears that with one arm the Commission embraces competition, and with the other the Commission "stiff-arms" firms fairly competing in the global market.

This concern over European protectionism is not new. In 1971, the European concern over American activity in Europe gave rise to the possibility that EC antitrust rules would be applied more stringently to U.S. companies than to European companies.[308] At that time, it was stated that large U.S. companies must recognize that if a mechanism can be developed within the European antitrust system to slow down the American appetite for acquisitions, it will most certainly be exploited.[309] In the summer of 1990, that mechanism may have been created in the form of the Merger Regulation.

VII. The Future: Is the WTO a Necessary Forum to Resolve International Competition Conflict?

As the boundaries between countries becomes blurred, the interdependence and globalization of the world's economies has shaped the nature of international relations between countries.[310] Problems in international relations arise when public policy makers assume that public policy goals may be set and reached independently from the will of those affected by such rules.[311] These problems are exacerbated because the international community lacks a supranational authority

306. *Boeing Challenge Could Spark New EU-U.S. Row*, THE REUTER EUR. COMM. RPT., Dec. 18, 1996.

307. *Id.*

308. *See* James A. Rahl, *Relationship of U.S. to EEC Antitrust Law*, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN EUROPE (1971) 80 (claiming the EC has concern over larger U.S. corporations and their impact in the EC). This has forced the EC to encourage European companies to merge. *Id.* This encouragement of mergers, however, cannot be applied equally to corporations within and outside the EC because if it were, European corporations would not be equal in size to the U.S. corporations. *Id.* This leads to the fear that EC competition law will not be applied fairly across the board. *Id.*

309. *See id.* (claiming large U.S. firms are a natural target for the Commission who has stated that it will take into account not merely the company's market share in the EC, but the total world power of the company).

310. Ignacio De Leon, *The Dilemma of Regulating International Competition under the WTO System*, 3 EUR. COMPETITION L. REV. 162 (1997); *see also* Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DEPAUL L. REV. 1097, 1107 (1995) (stating in the world today, the extraterritorial application of competition rules is to some degree inevitable). Without this application, transnational corporations would operate in a "twilight zone" where no country could exercise jurisdiction but the harmful effects of anticompetitive business practices would be felt in one or more countries. *Id.*

311. De Leon, *supra* note 310, at 162; *see also* Matsushita, *supra* note 310, at 1106 (warning customs are deeply rooted in a country's history and are generally more wide ranging and complex than competition rules can handle). With this in mind, a strengthened application of competition rules through the WTO can only provide a partial and unfortunately incomplete solution to the extraterritorial application of antitrust regulations. *Id.*

to which to refer the conflicts that might arise among its participants.[312] If competition regulations can be converged, the present problems can be mitigated if not resolved.[313]

The creation of a supranational authority would be a daunting task had the EC not faced the same challenge in instituting their competition policy.[314] The EC is the leader in examining the world competition issue in light of a world agenda,[315] while the U.S.[316] has taken a leave well enough alone attitude.[317] Sir Leon Britain, former Vice President of the Commission of the European Community, is in favor of having the WTO devise rules on competition, not only because the WTO currently handles competition and trade, but also because the WTO includes under developed nations. He believes this approach avoids questions of legitimacy that may encompass initiatives limited to the "quad"[318] or the Organization for Economic Cooperation and Development which is composed of industrialized countries.[319]

The U.S. and the EC provide the two principle antitrust models.[320] U.S. laws prohibit only those actions which artificially lower output and raise prices.[321] Therefore, even a dominant firm may vigorously compete even if it excludes competitors.[322] The objectives of EC competition law include the protection of small and

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312. De Leon, *supra* note 310, at 162; *see also* Matsushita, *supra* note 310, at 1104-05 (explaining that as individual economies globalize and governmental barriers to trade are removed, new trade issues will emerge). Differences in regulatory systems and differences in business customs will become evident. *Id.* These differences will impact the "level playing field" and foster claims of "unfairness." *Id.* As a consequence, harmonization of regulatory systems among trading countries must be a primary focus. *Id.*

313. *See* Matsushita, *supra* note 310, at 1104-05 (claiming allegations of "unfairness" arise from differences in the strength of enforcement of competition rules among countries). The weak enforcement of competition rules in one country means a claim by another country that its industries are disadvantaged. *Id.* The adversely impacted country will then retaliate through the use of trade restrictions. *Id.* To avoid this scenario, the convergence of international competition rules is emphasized in order to promote the "level playing field" requirement. *Id.*

314. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 2 (1997) (discussing the EC's concern for taking protectionism out of trade and competition in the internal European market). In analyzing a competitive situation, the EC asks, what are the limits to a State's actions, realizing the country's right to act in the interests of its citizens, that obstruct free trade thus harming the Community? *Id.*

315. *See id.* at 9 (pointing out present Competition Commissioner, Karl van Miert, formed a group to study the possibility of a supranational competition authority). The experts recommended a gradual movement toward an international conception of antitrust beginning with minimum standards. *Id.* At a ministerial conference in Singapore in 1996, the European Commission proposed the creation of an exploratory working group to consider the following: (1) What are the shared objectives of competition policy and what should they be? (2) Are there common substantive principles on which the nations may agree? (3) What further initiatives should be taken in the interest of cooperation and comity? (4) Should there be a dispute resolution mechanism for violations? *Id.*

316. *See id.* at 9 (stating in the 1980's, U.S. antitrust policy drifted from favoring open markets and entrepreneurial opportunity to narrowly focusing on out-put limiting conduct that artificially raises prices to consumers).

317. *Id.* at 2.

318. *See id.* at 9 n.38 (explaining that "quad" means Canada, the European Union, Japan and the United States).

319. *See* Fox, *supra* note 314, at 9.

320. *Id.* at 12.

321. *Id.*

322. *Id.*

medium sized companies from unfair exclusions and abusive practices.[323] The U.S. believes that their competition law is wiser, and that further intrusion by the government harms competition and efficiency.[324] Additionally, U.S. advocates fear a shift of the antitrust and trade issues from antitrust experts protecting consumers to trade experts protecting producers.[325] Finally, there is the danger that disputes will be resolved by those who do not understand the complexities of antitrust law.[326] Basically, Americans are leery of the relinquishment of sovereignty.[327]

Within the WTO, there are several proposals for the convergence of international competition regulations, most of which attempt to integrate U.S. and European viewpoints.[328] These proposals include: The Draft International Antitrust Code (DIAC);[329] an American Bar Association task force;[330] and a proposal by Professor Eleanor Fox of the New York University Law School.[331] The DIAC proposal, given the state of the international competition regulatory system of today, is seen as premature because it requires the unselfish relinquishment of national power in a system where each country jealously guards its sovereignty.[332] In today's competitive atmosphere, it would be prudent to start with a step-by-step approach.[333]

There are many more perspectives on competition law throughout the world.[334] Many countries do not "know" antitrust, and many nations proceed from myopic

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323. *See* Fox, *supra* note 314, at 12.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *See* Matsushita, *supra* note 310, at 1110-11 (explaining the proposals seek to address the concerns of each country and develop competition rules which bring together the positive aspects of each WTO member state's antitrust laws).

329. *See id.* (explaining that the DIAC was proposed by a group of international competition law scholars). The DIAC seeks to establish an international antitrust agency which would share the responsibility of enforcement of the proposed international antitrust code with national governments. *Id.* The Code's comprehensive coverage would include the major areas of competition law. *Id.*

330. *See id.* (stating this is a more modest proposal and would establish a task force from the ABA to advocate an agreement among countries as to some basic principles). Examples include an agreement on the unlawfulness of cartels, and unification of filing requirements under the merger laws of different countries. *Id.* Under the ABA proposal, there would be no international authority to enforce international rules, rather, the ABA proposal merely advocates partial harmonization through an agreement among states regarding some basic principles. *Id.*

331. *See id.* (describing Eleanor Fox's proposal as a further development of the ABA proposal). The Fox proposal includes a scheme where countries will agree on some "fundamental world-linking principles" of competition policy. *Id.* Under the Fox proposal, each country will enforce its own competition rules while adopting fundamental principles set forth in an international agreement. *Id.*

332. *See* Matsushita, *supra* note 310, at 1111 (claiming the DIAC proposal is better suited for the future when global economies will have advanced to where competition law will be ready for a supranational authority to enforce the rules).

333. *Id.*

334. *See* Fox, *supra* note 314, at 12 (explaining the U.S. and the EC are not the only governments with antitrust laws).

traditions and are concerned with the distribution of wealth, opportunity, access to markets, and control over powerful international corporations.[335] Although there are many differences, there is common ground among nations.[336] Most nations wish to: increase the welfare of their citizens; provide an opportunity to develop businesses; engage in the world market; increase national integrity; stabilize democracy; and secure peace.[337] These common desires of nations may ultimately lead to the internationalization of competition law through the World Trade Organization.[338]

VIII. CONCLUSION

Competition has been a driving force among companies and economies throughout the world since the 18th century. Since the *First Report on Competition Policy*, the EC has embraced competition as essential to a better society. In order to remain competitive, many corporations have no option but to merge, and regulation of those mergers is vital to holding in check the abuses of a free market system. The EC Merger Regulation has proved necessary to provide a stable mechanism for the protection of both a corporation's and a nation's interests. The international concern begins with the application of such regulations.[339] The European Commission, as legislator and enforcer, has the power to infuse *realpolitik* into a system that impacts nations and economies the world around. If abused, this power can severely impact global cooperation and competition, thus placing the consumer in a compromised position. It is true that a Commission decision can be appealed to the European courts, but one must weigh the costs of such a decision with no guarantee that national interests will not prevail again. For the

335. *Id.*

336. *Id.* at 13.

337. *Id.*

338. *Id.*; *see also* Matsushita, *supra* note 310, at 1118 (concluding the attachment to an individual country's sovereignty is still very strong even in today's global economy). This powerful factor must not be overlooked even though the globalization of economies has progressed to the extent that the "paranoia" over national sovereignty is becoming rather "passe." *Id.* There still exists a large difference between national attitudes and the reality of the global economy creating a paralyzing uncertainty. *Id. But see* De Leon, *supra* note 311, at 162 (articulating a counter argument to the formation of a supranational authority to oversee global competition law). The thesis of the article is that the current proposals promoting antitrust rules to regulate international transactions would regulate rivalry among firms, thus acting as a disincentive to competition. *Id.* This would undermine the international institutional framework due to the introduction of sources of discretion and uncontrolled behavior that could damage the expectations of the participants in the international economic arena. *Id. But see* Matsushita, *supra* note 311, at 1113 (stating that it is probably not possible to develop internationally acceptable rules under which each country regulates mergers since the regulation of mergers is closely related to a country's industrial structure and industrial policy). However, it is foreseeable that the WTO could develop a common format for merger guidelines which would enhance the transparency of merger regulation within a country. *Id.*

339. *See* VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 87 (4th ed. 1990) (stating, "My fear is that the competition rules are not being used to enable efficient firms to expand [at the expense of] the less efficient, but to protect smaller and medium sized firms at the expense of efficient or larger firms"). "I am concerned that the interests of consumers, and the economy as a whole, in the encouragement of efficiency by firms of any size is being subordinated to the interests of smaller traders." *Id.*

global market, a solution will be difficult to find. The World Trade Organization is a possibility, but it will likely take an uproar on both sides of the Atlantic before such a step is accepted.[340] In the mean time, the best approach seems to be decisions consistent with stated policy absent any intention to further interior interests. Such an approach will certainly add credibility to any regulatory system which impacts the global economy. Whatever the solution, it will be important to remember the poignant words of the Honorable Learned Hand: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[341]

340. *See* Elland, *supra* note 100, at 111 (discussing the fact that the Merger Regulation was resisted by Member States who did not want to give up their sovereign power and it took fifteen years before the Merger Regulation finally was accepted). It appears the same resistance is be being forwarded to the possibility of a neutral authority to decide large corporate mergers and it will probably take a similar amount of time before such a step is accepted. *Id.*

341. United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 430 (2d Cir. 1945).